CASE NO. 14-15700

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

S. ROWAN WILSON,

Plaintiff-Appellant,

v.

ERIC HOLDER, as Attorney General of the United States; THE U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; B. TODD JONES, as Acting Director of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives; ARTHUR HERBERT, as Assistant Director of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives; and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT COURT OF NEVADA

EXCERPTS OF RECORD OF APPELLANT S. ROWAN WILSON

VOLUME 1

Rainey Legal Group PLLC
CHARLES C. RAINEY, ESQ.
Nevada Bar No. 10723
Chaz@raineylegal.com
JENNIFER J. HURLEY, ESQ.
Nevada Bar No. 11817
Jennifer@raineylegal.com
9340 West Martin Avenue
Las Vegas, Nevada 89148
Telephone: +1.702.425.5100
Facsimile: +1.888.867.5734
Attorneys for Plaintiff/Appellant

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TONY WEST
Assistant Attorney General

DANIEL G. BOGDEN
United States Attorney

SANDRA SCHRAIBMAN
Assistant Director, Federal Programs Branch

ALICIA N. ELLINGTON
JOHN K. THEIS
Trial Attorneys, Federal Programs Branch
United States Department of Justice, Civil Division
20 Massachusetts Ave., N.W., Rm. 7226
Washington, D.C. 20530
Telephone: (202) 305-8550
Facsimile: (202) 616-8460
John.K.Theis@usdoj.gov
Alicia.N.Ellington@usdoj.gov

Attorneys for Defendants the United States of America, ATF, U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert, in their official capacities (collectively, the United States)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

S. ROWAN WILSON, Plaintiff, v. ERIC HOLDER, Attorney General of the United States et al., Defendants.	Case No.: 2:11-CV-1679-GMN-(PAL)

THE UNITED STATES'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56, Defendants the United States of America, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and

the individual defendants in their official capacities (collectively, the United States), by their undersigned counsel, hereby move this Court to dismiss Plaintiff's Complaint or, in the alternative, to enter summary judgment for Defendants. A Memorandum of Points and Authorities accompanies this motion, along with an Appendix of Secondary Material and a Statement of Undisputed Material Facts.

Dated: February 3, 2012

Respectfully submitted,

TONY WEST
Assistant Attorney General

DANIEL G. BOGDEN
United States Attorney

SANDRA SCHRAIBMAN
Assistant Director

/s/ Alicia N. Ellington
ALICIA N. ELLINGTON
JOHN K. THEIS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Rm. 7226
Washington, D.C. 20530
Telephone: (202) 305-8550
Facsimile: (202) 616-8460
Alicia.N.Ellington@usdoj.gov
John.K.Theis@usdoj.gov

Attorneys for Defendants the United States of America, ATF, U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert, in their official capacities (collectively, the United States)

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TONY WEST
Assistant Attorney General

DANIEL G. BOGDEN
United States Attorney

SANDRA SCHRAIBMAN
Assistant Director, Federal Programs Branch

ALICIA N. ELLINGTON
JOHN K. THEIS
Trial Attorneys, Federal Programs Branch
United States Department of Justice, Civil Division
20 Massachusetts Ave., N.W., Rm. 7226
Washington, D.C. 20530
Telephone: (202) 305-8550
Facsimile: (202) 616-8460
John.K.Theis@usdoj.gov
Alicia.N.Ellington@usdoj.gov

Attorneys for Defendants the United States of America, ATF, U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert, in their official capacities (collectively, the United States)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

S. ROWAN WILSON, Plaintiff, v. ERIC HOLDER, Attorney General of the United States et al., Defendants.	Case No.: 2:11-CV-1679-GMN-(PAL)

MEMORANDUM IN SUPPORT OF THE UNITED STATES'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

One provision of the Gun Control Act of 1968, as amended—18 U.S.C. § 922(g)(3)—prohibits an unlawful user of a controlled substance from possessing a firearm, while another provision—18 U.S.C. § 922(d)(3)—makes it unlawful to sell a firearm while knowing or having reasonable cause to believe that the purchaser is an unlawful user of a controlled substance. Under the Controlled Substances Act, marijuana is classified as a Schedule I controlled substance that cannot be lawfully prescribed and that the general public may not lawfully possess. Although a number of states, including Nevada, have exempted from state criminal prosecution certain individuals who use marijuana for medical purposes,[1] these state laws do not alter the fact that marijuana possession remains prohibited under federal law. To advise federal firearms licensees ("FFLs") of this basic fact, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued an Open Letter to all FFLs on September 21, 2011, stating that "any person who uses . . . marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of . . . a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition." See Compl., Ex. 2-B. The Open Letter further informed FFLs that "if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have 'reasonable cause to believe' that the person is an unlawful user of a controlled substance" and "you may not transfer firearms or ammunition to the person." Id. (quoting 18 U.S.C. § 922(d)(3)).

Alleging that she possesses a medical marijuana registry card issued by the State of Nevada and has been prevented from purchasing a handgun, Plaintiff S. Rowan Wilson claims that 18 U.S.C. § 922(g)(3), 18 U.S.C. § 922(d)(3), an ATF regulation defining certain statutory

[1] As discussed herein, see infra at 5, the federal government does not recognize a medical use for marijuana. Any use in this memorandum of terms such as "medical use" or "for medical purposes" should not be read to suggest otherwise.

terms, and ATF's September 2011 Open Letter "prohibit[] a certain class of law-abiding, responsible citizens from exercising their right to keep and bear arms" and therefore violate the Second Amendment and the equal protection component of the Fifth Amendment's Due Process Clause. Compl. ¶ 3. Plaintiff seeks a declaratory judgment, a permanent injunction, and monetary damages, but she has failed to state a claim for which relief can be granted.

First, Plaintiff's claim that § 922(g)(3) violates her Second Amendment rights must fail because the Ninth Circuit has already rejected a Second Amendment challenge to this provision, see United States v. Dugan, 657 F.3d 998 (9th Cir. 2011), and that constitutional analysis is not altered when the provision is applied to prohibit firearm possession by someone who uses marijuana in accordance with state law but in violation of federal law. Second, because it is consistent with the Second Amendment to prohibit any and all unlawful drug users from possessing firearms and because the Second Amendment does not convey a right to sell firearms, there can be no Second Amendment violation as a result of § 922(d)(3)'s ban on selling firearms to someone the seller knows or has reasonable cause to believe is an unlawful drug user, including those who possess a state-issued medical marijuana card as a result of having affirmatively registered to use marijuana. Third, Plaintiff's equal protection claim fails because she is not similarly situated to persons who are not violating federal law by using marijuana. And finally, even if Plaintiff had stated a claim against the federal government, no waiver of sovereign immunity allows her to recover monetary damages from the United States, whether for her constitutional damages claims or her conspiracy claim. Accordingly, the Complaint should be dismissed in its entirety.

BACKGROUND

I. THE GUN CONTROL ACT AND THE CONTROLLED SUBSTANCES ACT

The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220, included a provision—now codified at 18 U.S.C. § 922(g)—designed "to keep firearms out of the hands of presumptively risky people," including felons, the mentally ill, fugitives from justice, and

unlawful drug users. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983). Specifically, as applied to unlawful drug users, § 922(g)(3) provides that

> [i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) . . . to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(3). To help effectuate the firearm exclusions in § 922(g), Congress also banned selling firearms to the same categories of presumptively risky people; as relevant here, § 922(d)(3) makes it

> unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)).

Id. § 922(d)(3).

In addition to challenging the constitutionality of these two provisions, Plaintiff also targets 27 C.F.R. § 478.11, a regulation issued by ATF to define certain statutory terms. Specifically, the regulation defines an "[u]nlawful user of or addicted to any controlled substance" as

> [a] person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time . . . .

27 C.F.R. § 478.11. Additionally, the regulation echoes §§ 922(g)(3) and 922(d)(3) by providing that a "controlled substance" is "[a] drug or other substance, or immediate precursor, as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802." Id.

Section 102 of the Controlled Substances Act, in turn, defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter [21 U.S.C. § 812]." 21 U.S.C. § 802(6). Since the enactment of the Controlled Substances Act, marijuana (also known as cannabis) has been classified as a Schedule I drug. 21 U.S.C. § 812(c), Schedule I(c)(10). By classifying marijuana as a Schedule I drug, Congress has determined that marijuana "has a high potential for abuse," that it "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of [marijuana] under medical supervision." Id. § 812(b)(1).[2] As such, Schedule I drugs, including marijuana, cannot be legally prescribed for medical use. See 21 U.S.C. § 829; see also United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) ("Whereas some other drugs can be dispensed and prescribed for medical use, . . . the same is not true for marijuana."). Additionally, it is generally unlawful for any person to knowingly or intentionally possess marijuana. See 21 U.S.C. § 844(a). For Schedule I drugs like marijuana, the only exception to this ban on possession is for a federally approved research project. See id. § 823(f); see also Gonzales v. Raich, 545 U.S. 1, 14 (2005) ("By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the . . . possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study.").

II. NEVADA'S LAW REGARDING THE MEDICAL USE OF MARIJUANA

Separate and apart from federal law, the State of Nevada also criminalizes the possession of marijuana. See Nev. Rev. Stat. § 453.336. In 2000, however, Nevada's Constitution was

[2] The Controlled Substances Act delegates authority to the Attorney General to reschedule controlled substances after consulting with the Secretary of Health and Human Services. Id. § 811. The Department of Justice's Drug Enforcement Agency ("DEA") has repeatedly denied petitions to have marijuana removed from schedule I, most recently in 2011. See Notice of Denial of Petition, 76 Fed. Reg. 40552 (July 8, 2011); see also Gonzales v. Raich, 545 U.S. 1, 15 & n.23 (2005). Based largely on scientific and medical evaluations prepared by the Department of Health and Human Services, DEA has consistently found that marijuana continues to meet the criteria for schedule I control. See 76 Fed. Reg. at 40552.

amended by initiative petition to add the following provision regarding the medical use of marijuana:

> The legislature shall provide by law for . . . [t]he use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment.

Nev. Const. art. IV, § 38(1)(a). Pursuant to this constitutional amendment, Nevada enacted legislation in 2001 that exempts the medical use of marijuana from state prosecution in certain circumstances. See Nev. Rev. Stat. Ch. 453A. Subject to certain exceptions, the law provides that "a person who holds a valid registry identification card . . . is exempt from state prosecution for . . . [a]ny . . . criminal offense in which the possession, delivery or production of marijuana . . . is an element." Nev. Rev. Stat. § 453A.200(1)(f).[3] This exemption only applies to the extent that the holder of a registry identification card (i) engages in "the medical use of marijuana in accordance with the provisions of this chapter as justified to mitigate the symptoms or effects of the person's chronic or debilitating medical condition;" and (ii) "[d]o[es] not, at any one time, collectively possess, deliver or produce more than . . . [o]ne ounce of usable marijuana[,] [t]hree mature marijuana plants[,] and [f]our immature marijuana plants." Id. § 453A.200(3).

The law also specifies who is eligible to receive a state-issued registry identification card, requiring applicants to provide, inter alia, "[v]alid, written documentation from the person's attending physician stating that . . . [t]he person has been diagnosed with a chronic or debilitating medical condition." Id. § 453A.210(2)(a)(1).[4] The applicant must also provide documentation

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[3] The statute specifies, however, that cardholders are not exempt from state prosecution for a number of other crimes related to marijuana use. Id. § 453A.300(1). In addition, a separate provision of Nevada law specifies that "[a] person shall not own or have in his or her possession or under his or her custody or control any firearm if the person . . . [i]s an unlawful user of, or addicted to, any controlled substance," and defines the term "controlled substance" by reference to the federal Controlled Substances Act. Nev. Rev. Stat. § 202.360(1)(c), (3)(a).

[4] The statute defines the term "chronic or debilitating medical condition" to include AIDS, cancer, and glaucoma, as well as "[a] medical condition or treatment for a medical condition that

(*Footnote continued on following page.*)

from his or her physician stating that "[t]he medical use of marijuana may mitigate the symptoms or effects of that condition" and that "[t]he attending physician has explained the possible risks and benefits of the medical use of marijuana." Id. § 453A.210(2)(a)(2)–(3). The state-issued registry identification card is valid for one year and must be renewed by annually submitting updated written documentation from the cardholder's attending physician, including proof that the individual continues to suffer from a chronic or debilitating medical condition. Id. §§ 453A.220(4), 453A.230. If a cardholder is "diagnosed by the person's attending physician as no longer having a chronic or debilitating medical condition, the person . . . shall return the[] registry identification card[] to the [State] within 7 days after notification of the diagnosis." Id. § 453A.240.

Nevada's law governing the medical use of marijuana does not purport to "legalize" medical marijuana, but rather specifies the limited circumstances under which the possession of limited amounts of marijuana for medical use is exempt from state prosecution. This fact is evidenced by the overall structure of the statute, as well as by the act's inclusion of a directive instructing the next session of the Nevada legislature to "review statistics provided by the legislative counsel bureau with respect to . . . [w]hether persons exempt from state prosecution [under] this act have been subject to federal prosecution for carrying out the activities concerning which they are exempt from state prosecution pursuant to [the act]." Act of June 14, 2001 (Assembly Bill 453), ch. 592, § 48.5. Along these lines, a one-page "Important Notice" posted on the State of Nevada's Department of Health and Human Services, Health Division's website advises the public that "**ISSUANCE OF A STATE OF NEVADA MEDICAL MARIJUANA REGISTRY CARD DOES NOT EXEMPT THE HOLDER FROM PROSECUTION UNDER FEDERAL LAW**." See Nev. State Health Div., Important Notice (Feb. 12, 2009),

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produces, for a specific patient," one or more of the following symptoms: (i) cachexia, (ii) persistent muscle spasms, (iii) seizures, (iv) severe nausea, or (v) severe pain. Id. § 453A.050.

http://health.nv.gov/PDFs/MMP/ImportantNotice.pdf (emphasis in original) [App.[5] at Tab 1]; see also Nev. State Health Div., Program Facts 2 (Feb. 12, 2009), http://health.nv.gov/PDFs/MMP/ProgramFacts.pdf [App. at Tab 2] (stating, in a two-page document posted on the Health Division's website, that "[t]he Medical Marijuana law is a state law, offering protection from state law enforcement only" and that "[t]he federal government does not recognize the state law and is not bound by it"). A section of the Nevada Health Division's website answering frequently asked questions also informs the public that cardholders cannot fill a prescription for medical marijuana at a pharmacy because "[t]he federal government classifies marijuana as a Schedule I drug, which means licensed medical practitioners cannot prescribe it." Nev. State Health Div., Medical Marijuana, Frequently Asked Questions, No. 8, http://health.nv.gov/MedicalMarijuana_FAQ.htm (last updated Sept. 29, 2011) [App. at Tab 3]. The frequently asked questions page also specifies that a patient may withdraw from the program by submitting a written statement indicating that he or she wishes to withdraw and by returning the individual's registry identification card. Id., No. 12.

III. ATF'S SEPTEMBER 2011 OPEN LETTER TO FFLS

On September 21, 2011, ATF issued an "Open Letter to All Federal Firearms Licensees." See Compl., Ex. 2-B. The Open Letter first notes that ATF "has received a number of inquiries regarding the use of marijuana for medicinal purposes and its applicability to Federal firearms laws" and that the "purpose of this open letter is to provide guidance on the issue and to assist [FFLs] in complying with Federal firearms laws and regulations." Id. The Open Letter then observes that "[a] number of States have passed legislation allowing under State law the use or possession of marijuana for medicinal purposes" and that "some of these States issue a card authorizing the holder to use or possess marijuana under State law." Id. The Open Letter proceeds to summarize the relevant provisions of federal law, noting (i) that "18 U.S.C.

[5] Pursuant to Local Rule 7-3, the United States has concurrently filed an appendix to this memorandum containing secondary materials cited herein.

§ 922(g)(3)[] prohibits any person who is an 'unlawful user of or addicted to any controlled substance . . .' from shipping, transporting, receiving or possessing firearms or ammunition;" (ii) that the Controlled Substances Act lists marijuana as a Schedule I controlled substance and that "there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law;" (iii) that "18 U.S.C. § 922(d)(3)[] makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is an unlawful user of or addicted to a controlled substance;" and (iv) that, under 27 C.F.R. § 478.11, "'an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonable covers the present time.'" Compl., Ex. 2-B (emphasis in original). The Open Letter then interprets these provisions to draw two conclusions: first, "any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition." Id. Second, if an FFL is "aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then [the FFL] ha[s] 'reasonable cause to believe' that the person is an unlawful user of a controlled substance" and "may not transfer firearms or ammunition to the person." Id. This conclusion holds, the Open Letter notes, even if the potential transferee answered "no" to Question 11(e) on ATF Form 4473,[6] which asks, "Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?" Id.; see also Compl., Ex. 2-C.

[6] ATF Form 4473 is a firearms transaction record that all potential purchasers are required to complete before receiving a firearm from an FFL. See 27 C.F.R. § 478.124.

IV. PLAINTIFF'S COMPLAINT

According to the Complaint,[7] Plaintiff applied for a medical marijuana registry card from the State of Nevada in October 2010. Compl. ¶ 35. Since the age of ten, Plaintiff has experienced severe menstrual cramps, which she describes as "sometimes debilitating, even leading to further painful side effects, such as severe nausea and cachexia." Compl., Ex. 1, ¶ 20. As part of her application for a registry identification card, Plaintiff "obtained a doctor's recommendation for the use of medical marijuana." Compl. ¶ 36. On May 12, 2011, Nevada issued a registry identification card to Plaintiff. Id. ¶ 37; see also Compl., Ex. 1-B.

Approximately five months later, on October 4, 2011, Plaintiff visited Custom Firearms & Gunsmithing, a federally licensed gun store in Moundhouse, Nevada, to purchase a handgun. In order to effect the transaction, Plaintiff began to complete ATF Form 4473, but left Question 11(e) blank. See Compl., Ex. 1-C. Plaintiff alleges that her "natural inclination" was to answer "no" to Question 11(e), but that Mr. Frederick Hauseur, IV, the store's proprietor, informed her that ATF had "promulgated a policy whereby any person holding a medical marijuana registry card is automatically considered an 'unlawful user of, or addicted to marijuana.'" Compl. ¶ 42. She states that she decided to leave the question blank because she "holds a valid medical marijuana registry card issued by the State of Nevada, but is clearly not an unlawful user of or addicted to marijuana." Id. ¶ 43. When Plaintiff provided the form to Mr. Hauseur, he informed her that he was prohibited from selling her any firearm or ammunition. Compl., Ex. 1, ¶ 32. Mr. Hauseur and Plaintiff had known each other for nearly a year, and Mr. Hauseur was previously aware that Plaintiff possessed a state-issued medical marijuana registry card. Id.; Compl., Ex. 2, ¶ 11. With that knowledge and having received notice of ATF's Open Letter, Mr. Hauseur determined he could not sell Plaintiff a firearm without jeopardizing his status as a FFL. Compl., Ex. 2, ¶ 12. Plaintiff alleges more generally that she "presently intends to acquire a functional

[7] The facts alleged in Plaintiff's Complaint are accepted as true for purposes of the United States's Motion to Dismiss.

handgun for use within her home for self-defense but is prevented from doing so" by federal law, as implemented by ATF. Compl. ¶ 6.

On October 18, 2011, Plaintiff filed a three-count Complaint against the United States, ATF, U.S. Attorney General Eric Holder, ATF Acting Director B. Todd Jones, and ATF Assistant Director Arthur Herbert.[8] In Count One, Plaintiff alleges that 18 U.S.C. § 922(g)(3), 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and ATF's September 2011 Open Letter violate her right to keep and bear arms under the Second Amendment. Compl. ¶¶ 46–51. In Count Two, Plaintiff alleges that these same "laws and policies" violate her Fifth Amendment right to equal protection. Id. ¶¶ 52–57. In Count Three, Plaintiff raises a conspiracy claim, alleging that "[t]he Defendants, and each of them, acted in concert to deprive the Plaintiff of her Second and Fifth Amendment rights by enacting and enforcing the unconstitutional laws, policies, practices and/or procedures complained of in this action." Id. ¶ 59. For relief, Plaintiff seeks a declaration "that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and derivative regulations, such as 27 C.F.R. § 478.11," violate the Second Amendment and the Due Process Clause of the Fifth Amendment, as well as an injunction preventing the enforcement of these laws and regulations. Compl., Prayer for Relief, ¶¶ 1–3. She also seeks compensatory and punitive damages. Id. ¶ 4.

ARGUMENT

I. PLAINTIFF'S SECOND AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED

The Ninth Circuit has held that Congress did not violate the Second Amendment by prohibiting unlawful drug users from possessing firearms. See United States v. Dugan, 657 F.3d 998 (9th Cir. 2011). This binding holding applies to all unlawful drug users, even those whose marijuana use is not a crime as a matter of state law. Even if the Ninth Circuit had not already upheld 18 U.S.C. § 922(g)(3) against a Second Amendment challenge, Plaintiff's claim against

[8] Plaintiff names Defendants Holder, Jones, and Herbert in both their official and their individual capacities. A separate, contemporaneously-filed motion to dismiss by the individual defendants addresses the specific reasons why Plaintiff's claims against these defendants in their individual capacities must fail.

that provision would still fail because it proscribes activity that falls outside the scope of the Second Amendment's protections. In any event, because prohibiting possession of firearms by unlawful drug users, including marijuana users, substantially relates to the important governmental interests in combatting violent crime and protecting public safety, 18 U.S.C. § 922(g)(3) does not violate Plaintiff's Second Amendment rights. Plaintiff's challenge to § 922(d)(3) and to ATF's interpretation of that provision in the September 2011 Open Letter similarly fails. The Second Amendment does not protect a right to sell firearms. Moreover, because § 922(g)(3)—which prohibits unlawful drug users' firearm possession—does not violate the Second Amendment, the fact that § 922(d)(3) might prevent unlawful drug users from acquiring firearms does not render that provision constitutionally suspect.

A. As Applied to Plaintiff, 18 U.S.C. § 922(g)(3), as Implemented and Interpreted by ATF, Does Not Violate the Second Amendment.

1. Plaintiff's Second Amendment Challenge to § 922(g)(3) Is Foreclosed By the Ninth Circuit's Decision in Dugan.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In District of Columbia v. Heller, 554 U.S. 570 (2008), after determining that the Second Amendment confers an individual right to keep and bear arms, id. at 595, the Supreme Court held that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self defense," id. at 635. The Court's holding was narrow and addressed only the "core" right of "law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 634–35 (emphasis added).

The Supreme Court also took care to note that, like other constitutional rights, the right to keep and bear arms is "not unlimited." Id. at 626. Although the Supreme Court declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," it cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding

prohibitions on the possession of firearms by felons and the mentally ill . . . or laws imposing conditions and qualifications on the commercial sale of arms." Id. at 626–27. The Court clarified that it was "identify[ing] these presumptively lawful regulatory measures only as examples" and that its list was not "exhaustive." Id. at 627 n.26; see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010).

Following Heller, numerous Second Amendment challenges have been raised against § 922(g)(3), and not one has succeeded. See, e.g., United States v. Yancey, 621 F.3d 681, 683, 687 (7th Cir. 2010) (holding that § 922(g)(3) was "equally defensible" as, and analogous to, the categorical bans described as presumptively lawful in Heller and that "Congress acted within constitutional bounds by prohibiting illegal drug users from firearm possession because it is substantially related to the important governmental interest in preventing violent crime"); United States v. Seay, 620 F.3d 919, 925 (8th Cir. 2010) ("find[ing] that § 922(g)(3) is the type of 'longstanding prohibition[] on the possession of firearms' that Heller declared presumptively lawful"); United States v. Richard, 350 F. App'x 252, 260 (10th Cir. 2009) (unpublished); United States v. Korbe, Criminal No. 09-05, 2010 WL 2404394, at *3–4 (W.D. Pa. June 9, 2010); United States v. Hendrix, No. 09-cr-56-bbc, 2010 WL 1372663, at *3 (W.D. Wis. Apr. 6, 2010); see also United States v. Patterson, 431 F.3d 832, 835–36 (5th Cir. 2005) (holding, pre-Heller, that although the Fifth Circuit recognized an individual right to bear arms, a criminal defendant's Second Amendment challenge to § 922(g)(3) was unavailing).[9]

[9] United States v. Carter, __ F.3d __, No. 09-5074, 2012 WL 207067 (4th Cir. Jan. 23, 2012), is not to the contrary. There, the Fourth Circuit found that the government had failed to meet its burden of establishing a record showing a reasonable fit between § 922(g)(3) and the government's important interest in public safety, and it therefore remanded to allow the government an opportunity to substantiate the record. Carter, 2012 WL 207067, at *7–8. In doing so, however, the Fourth Circuit noted that the record necessary to justify § 922(g)(3) "need not be as fulsome as that necessary to justify" other sub-sections of § 922(g) because, unlike the other sub-sections, § 922(g)(3) "only applies to persons who are currently unlawful users or addicts." Id. at *6. Indeed, the court proceeded to observe that the government's burden on remand "should not be difficult to satisfy in this case, as the government has already asserted in argument several risks of danger from mixing drugs and guns" and noted that the Seventh Circuit in Yancey had "identified a number of studies demonstrating 'the connection between chronic drug abuse and violent crime.'" Id. at *7–8.

The Ninth Circuit similarly upheld § 922(g)(3) against a Second Amendment challenge in Dugan. Like the other courts to have considered the issue, the Ninth Circuit found significant Heller's language indicating that § 922(g)(1)'s prohibition on firearm possession by felons and § 922(g)(4)'s prohibition on firearm possession by the mentally ill were presumptively lawful. Dugan, 657 F.3d at 999. The court found that "the same amount of danger" is presented by allowing habitual drug users to possess firearms because "[h]abitual drug users, like career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances." Id. The court also found an important distinction between § 922(g)(3) and the two prohibitions declared presumptively lawful by Heller that actually favored § 922(g)(3)'s constitutionality—namely, that "an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse," whereas those individuals who have been convicted of a felony or committed to a mental institution generally face a lifetime ban. Id. The court therefore concluded that "[b]ecause Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, . . . Congress may also prohibit illegal drug users from possessing firearms." Id. at 999–1000.

Although not evident from the face of the opinion, Dugan, like Plaintiff, possessed a state-issued card exempting him from state prosecution for using marijuana for medical purposes. See Brief for Appellant at 59, Dugan, 657 F.3d 998 (No. 08-10579), ECF No. 57 ("Here, Mr. Dugan was . . . licensed to grow and use medical marijuana."). Indeed, the central argument in Dugan's Second Amendment challenge was that "millions of Americans peacefully engage in the unlawful use of marijuana—and millions more do so legally under state medical marijuana laws—without engaging in any behavior that would provide a legitimate basis for excluding them from the reach of the Second Amendment." Id. at 57. The Ninth Circuit, however, treated Dugan's status as a medical marijuana cardholder as irrelevant to his Second Amendment claim—and rightly so. Congress has determined that marijuana "has no currently

accepted medical use in treatment in the United States," 21 U.S.C. § 812(b)(1)(B), and has accordingly specified that it may not be validly prescribed or lawfully possessed, id. §§ 829, 844(a). Although several states, including Nevada, have taken a different view of marijuana's potential medical benefits, it is well settled that Congress has authority under the Commerce Clause to criminalize marijuana possession, even if such possession is not also illegal under state law. See Gonzales v. Raich, 545 U.S. 1 (2005); see also Raich v. Gonzales ("Raich II"), 500 F.3d 850, 861–64 (9th Cir. 2007) (holding, on remand from the Supreme Court, that there is no Ninth Amendment or substantive due process right to use marijuana for claimed medical purposes); Mont. Caregivers Ass'n v. United States, __ F. Supp. 2d __, No. CV 11-74-M-DWM, 2012 WL 169771 (D. Mont. Jan. 20, 2012). All users of marijuana are therefore unlawful users of a controlled substance, and Dugan's holding that Congress may "prohibit illegal drug users from possessing firearms" without violating the Second Amendment applies equally to them all. 657 F.3d at 999–1000; see also United States v. Stacy, No. 09cr3695 BTM, 2010 WL 4117276, at *7 (S.D. Cal. Oct. 18, 2010) (noting, in the course of rejecting a Second Amendment challenge to § 922(g)(3), that "[t]he fact that this particular case involves the alleged lawful use of marijuana under state law does not have any bearing on the presumptively lawful nature of the restriction"). As such, Plaintiff's claim that her Second Amendment rights have been violated by § 922(g)(3), as interpreted by ATF, must fail.

2. Unlawful Drug Users Fall Outside the Scope of the Second Amendment as Understood at the Adoption of the Bill of Rights.

Even if Plaintiff's Second Amendment challenge to § 922(g)(3) were not foreclosed by Dugan, it would still fail because unlawful drug users are not within the class of law-abiding, responsible citizens historically protected by the Second Amendment. As noted earlier, Heller's holding was relatively narrow, recognizing only the "core" right of "law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 634–35 (emphasis added). Given this, as well as the Court's recognition that categorical prohibitions on firearm possession

by felons and the mentally ill are presumptively lawful, it is clear that Heller's determination that the Second Amendment confers an individual right to keep and bear arms cannot be misconstrued as recognizing a right for all individuals to possess firearms, no matter the circumstances. Rather, Heller's carefully crafted articulation of the right at the core of the Second Amendment acknowledges that the Anglo-American right to arms that was incorporated into the Bill of Rights was subject to certain well-recognized exceptions.[10] Given the relatively recent history of federal enactments disqualifying felons and the mentally ill from possessing weapons,[11] Heller also teaches that "exclusions [from the right to bear arms] need not mirror limits that were on the books in 1791," when the Second Amendment was enacted. United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); see also id. at 640 ("[Heller] tell[s] us that statutory prohibitions on the possession of weapons by some persons are proper—and . . . that the legislative role did not end in 1791. That some categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details."). Nevertheless, the history of the right to arms as it developed in England and the American colonies is consistent not only with the disarmament of convicted felons and the mentally ill, but also more broadly supports Congress's authority to prohibit firearm possession by non-law-abiding citizens, including those who violate drug laws.

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[10] It is "perfectly well settled" that the Bill of Rights embodies "certain guaranties and immunities which we had inherited from our English ancestors," and "which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case." Robertson v. Baldwin, 165 U.S. 275, 281 (1897). The Court similarly recognized that "[i]n incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." Id.; see also Rutan v. Republican Party of Ill., 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting) ("The provisions of the Bill of Rights . . . did not create by implication novel individual rights overturning accepted political norms.").

[11] See Skoien, 614 F.3d at 640–41 ("The first federal statute disqualifying felons from possessing firearms was not enacted until 1938 . . . . [T]he ban on possession by all felons was not enacted until 1961. . . . Moreover, legal limits on the possession of firearms by the mentally ill also are of 20th Century vintage; § 922(g)(4), which forbids possession by a person 'who has been adjudicated as a mental defective or who has been committed to a mental institution,' was not enacted until 1968." (citations omitted)).

Heller identified the right protected by the 1689 English Declaration of Rights as "the predecessor to our Second Amendment." 554 U.S. at 593. This document provided, "That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law." Id. (quoting 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689)) (emphasis added). It is undisputed that both before and after its adoption, the English government retained the power to disarm individuals it viewed as dangerous. Id. at 582. Moreover, "like all written English rights," this right to arms "was held only against the Crown, not Parliament," id. at 593, and thus its scope was only "as allowed by law." Significantly, the English Declaration of Rights did not repeal the 1662 Militia Act, which authorized lieutenants of the militia (appointed by the King) to disarm "any person or persons" judged "dangerous to the Peace of the Kingdome," 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.) (emphasis added), and "was to remain in force with only insignificant changes for many years to come," Joyce Lee Malcolm, To Keep and Bear Arms 123 (1994) [App. at Tab 4]; accord Patrick J. Charles, "Arms for Their Defence"?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated in McDonald v. City of Chicago, 57 Clev. State L. Rev. 351, 373, 376, 382–83, 405 (2009). Since the act was employed against those viewed as "disaffected or dangerous," Charles, 57 Clev. State L. Rev. at 376–78, individuals could be disarmed without any adjudication of wrongdoing.

The documentary record surrounding the adoption of the Constitution similarly confirms that the right to keep and bear arms was limited to "law-abiding and responsible" citizens. In other words, "it is clear that the colonists, at least in some manner, carried on the English tradition of disarming those viewed as 'disaffected and dangerous.'" United States v. Tooley, 717 F. Supp. 2d 580, 590 (S.D. W.Va. 2010). Notably, "Heller identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents," which "asserted that citizens have a personal right to bear arms 'unless for crimes committed, or real danger of

public injury from individuals.'" Skoien, 614 F.3d at 640 (quoting Heller, 554 U.S. at 604; 2 Bernard Schwartz, The Bill of Rights: A Documentary History 665 (1971) (emphasis added)). "One reason for considering this proposal 'highly influential,' is that it represents the view of the Anti-federalists – the folk advocating . . . for a strong Bill of Rights." Tooley, 717 F. Supp. 2d at 590. This proposal demonstrates that, at the time the Constitution was adopted, even ardent supporters of guaranteeing an individual right to keep and bear arms recognized that criminals and other dangerous individuals should not enjoy its benefits. Although the Second Amendment itself proved more "succinct[]" than the Pennsylvania proposal, Heller, 554 U.S. at 659 (Stevens, J., dissenting), the latter remains probative of how the Amendment's supporters viewed the balance between public security and the right to keep and bear arms. See id. at 605 (reaffirming that "the Bill of Rights codified venerable, widely understood liberties").

The Pennsylvania proposal, moreover, supports the view that "the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue." Don B. Kates & Clayton E. Cramer, Second Amendment Limitations and Criminological Considerations, 60 Hastings L.J. 1339, 1360 (2009); see also Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda, 56 UCLA L. Rev. 1443, 1497 (2009) ("[A]ny textual or original-meaning limitations on who possesses the right will often stem from the perception that certain people aren't trustworthy enough to possess firearms."); id. at 1510 (opining that "those whose judgment is seen as compromised by mental illness, mental retardation, or drug or alcohol addiction have historically been seen as less than full rightholders"); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 492 (2004); Robert E. Shalhope, The Armed Citizen in the Early Republic, 49 Law & Contemp. Probs. 125, 130 (1986). Additional historical support for this understanding of the right is found in nineteenth-century cases upholding state legislation restricting firearm possession by certain classes of people perceived to be dangerous.

For example, the Missouri Supreme Court held in 1886 that a state law prohibiting intoxicated persons from carrying firearms did not violate the state constitutional right to keep and bear arms. State v. Shelby, 2 S.W. 468, 468–69 (Mo. 1886).

Courts interpreting the Second Amendment following Heller have recognized the importance of the Amendment's historical limitations. See, e.g., Heller v. District of Columbia ("Heller II"), __F.3d __, 2011 WL 4551558, at *5 (D.C. Cir. Oct. 4, 2011); United States v. Chester, 628 F.3d 673 (4th Cir. 2010). Indeed, the First Circuit recently relied, in part, on historical sources in holding that the right to keep arms does not extend to juveniles. United States v. Rene E., 583 F.3d 8, 15-16 (1st Cir. 2009), cert. denied, 130 S. Ct. 1109 (Jan. 11, 2010). The Ninth Circuit has recognized this history as well, noting that "most scholars of the Second Amendment agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]' . . . and that 'the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)." United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010) (quoting Don B. Kates, Jr., The Second Amendment: A Dialogue, 49 Law & Contemp. Probs. 143, 146 (1986)).

This history is sufficient to resolve Plaintiff's challenge to § 922(g)(3). Simply put, unlawful drug users—a category that includes all marijuana users—are outside the class of "law-abiding, responsible" citizens historically protected by the Second Amendment. Because the right to keep arms does not extend to those who are actively engaged in illegal activity, § 922(g)(3), as interpreted by ATF, cannot violate the Second Amendment. See Hendrix, 2010 WL 1372663, at *3 ("Preventing criminal users of controlled substances from possessing guns is not a restriction on the values that the Second Amendment protects, which, to repeat, is the right of law-abiding citizens to possess handguns in their homes for self-protection.").

3. In Any Event, As Applied to Marijuana Users, 18 U.S.C. § 922(g)(3) Substantially Relates to the Important Governmental Interest in Protecting Public Safety and Combating Violent Crime.

Even if the Court declines to reach the issue of whether unlawful drug users fell outside the scope of the Second Amendment as understood at the time of its adoption, it should still uphold § 922(g)(3), as applied to all marijuana users, because the statute easily survives heightened review. In Heller, the Supreme Court did not specify which standard of review should be applied in Second Amendment cases, other than to rule out use of rational-basis scrutiny. 554 U.S. at 628 & n.27. This question is still unsettled in the Ninth Circuit: a panel of that court recently took a step towards resolving the issue, holding that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment," although declining to decide "precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights." Nordyke v. King, 644 F.3d 776, 786 & n.9 (9th Cir. 2011). The Ninth Circuit has decided to rehear that case en banc, however, and the panel opinion has been stripped of precedential force. Nordyke, No. 07-15763, 2011 WL 5928130 (9th Cir. Nov. 28, 2011). The other courts of appeals that have addressed the standard-of-review issue have uniformly concluded that this type of regulation is, at most, subject to intermediate scrutiny. The Fourth Circuit, for example, recently declined to decide whether firearm possession by unlawful drug users was understood to be within the scope of the Second Amendment's guarantee at the time of ratification, but then rejected the defendant's claim that strict scrutiny should apply to his challenge because he purchased the guns at issue for self-defense in the home. United States v. Carter, __ F.3d __, No. 09-5074, 2012 WL 207067, at *4 (4th Cir. Jan. 23, 2012). Instead, the court applied intermediate scrutiny, explaining that "[w]hile we have noted that the application of strict scrutiny is important to protect the core right of self-defense identified in Heller, that core right is only enjoyed, as Heller made clear, by 'law-abiding, responsible citizens,'" which unlawful drug users "cannot claim to be." Id. The court noted that it was "join[ing] the other courts of appeals that have rejected the application of strict

scrutiny in reviewing the enforcement of § 922(g)(3), or, for that matter, any other subsection of § 922(g)." Id. at *5; see also Yancey, 621 F.3d at 683 (applying intermediate scrutiny to a § 922(g)(3) challenge); cf. United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to challenge to § 922(g)(8)); Heller II, 2011 WL 4551558, at *9 (applying intermediate scrutiny to review novel gun registration laws). Given this weight of authority, intermediate scrutiny is the highest standard of review that should potentially apply here.

There can be no doubt that § 922(g)(3), as applied to marijuana users, satisfies intermediate scrutiny. Under intermediate scrutiny, "a regulation must be substantially related to an important governmental objective." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir. 2009). An important—indeed, compelling—governmental interest is at stake here—namely, the government's interest in protecting public safety and preventing violent crime. See United States v. Salerno, 481 U.S. 739, 748, 750 (1987) (noting that the Supreme Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest" and that the "[g]overnment's general interest in preventing crime is compelling"); Schall v. Martin, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."); see also Carter, 2012 WL 207067, at *5 ("We readily conclude in this case that the government's interest in 'protecting the community from crime' by keeping guns out of the hands of dangerous persons is an important governmental interest."); Yancey, 621 F.3d at 684 ("The broad objective of § 922(g)—suppressing armed violence—is without doubt an important one.").

In terms of evaluating the fit between the indisputably important objectives at stake and the prohibition in § 922(g)(3), there are several relevant considerations that affect the analysis. First, intermediate scrutiny, "by definition, allows [the government] to paint with a broader brush" than strict scrutiny. Peruta v. Cnty. of San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) (internal quotation marks and citation omitted). Second, in order to advance its compelling interests in combating crime and protecting public safety, Congress may need to

make "predictive judgments" about the risk of dangerous behavior. Turner Broad. Sys. v. FCC, 512 U.S. 622, 665 (1994). Such judgments are entitled to "substantial deference" by the courts because Congress is "far better equipped than the judiciary" to collect, weigh, and evaluate the relevant evidence and to formulate appropriate firearms policy in response. Id. at 665–66. Third, "the nature and quantity of any showing required by the government 'to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.'" Carter, 2012 WL 207067, at *6 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000)). Since it is hardly novel—and entirely plausible—that mixing guns and drugs poses a severe risk to public safety, the government's burden here is relatively low. Finally, the government may carry its burden by relying on "a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require." Id.

All of these sources point inexorably to the conclusion that a substantial relationship exists between § 922(g)(3) as applied to marijuana users and Congress's goals of protecting public safety and combatting violent crime. Congress enacted the precursor to what is now § 922(g)(3) in the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Congressional action was prompted by the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." H.R. Rep. No. 90-1577, at 7 (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4412. To meet this growing problem, Congress banned certain classes of individuals from receiving firearms shipped in interstate commerce based on Congress's determination that access to guns by those groups of people was generally contrary to the public interest. See Huddleston v. United States, 415 U.S. 814, 824 (1974) ("The principal purpose of the federal gun control legislation . . . was to [curb] crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" (quoting S. Rep. No. 90-1501, at 22 (1968))). As the House manager stated during debate on the legislation:

> [W]e are convinced that a strengthened [firearms control system] can significantly contribute to reducing the danger of crime in the United States. No one can

> dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons.

114 Cong. Rec. 21657, 21784 (1968) (quoted in Huddleston, 415 U.S. at 828; Yancey, 621 F.3d at 686). Moreover, Congress evidenced a particular concern with marijuana use: "[w]hile the statute swept in users of several different categories of drugs, marijuana was the only drug specifically listed by name." Carter, 2012 WL 207067, at *5 (citing 82 Stat. 1213, 1220–21, which prohibited receipt of firearms by any person who is "'an unlawful user of or addicted to marihuana or any depressant or stimulant drug . . . or narcotic drug'"). [12]

Significantly, Congress is not the only legislative body to draw the conclusion that guns and drugs do not mix. Rather, as the court in Yancey found significant, "many states have restricted the right of habitual drug abusers or alcoholics to possess or carry firearms." 621 F.3d at 684.[13] Indeed, Nevada is among the states that have codified an analogue to § 922(g)(3); the state legislature amended a pre-existing provision in 2003 to specify that "[a] person shall not own or have in his or her possession or under his or her custody or control any firearm if the person . . . [i]s an unlawful user of, or addicted to, any controlled substance." Nev. Rev. Stat. § 202.360(1)(c). Like § 922(g)(3), the state statute further provides that "'controlled substance' has the meaning ascribed to it in 21 U.S.C. § 802(6)." Id. § 202.360(3)(a). Taken together, the

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[12] As Carter notes in recounting § 922(g)(3)'s legislative history, the "the 1968 enactment . . . contained a number of loopholes." Id. at *6. The provision took its current shape with the enactment of the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986).

[13] See Ala. Code § 13A-11-72(b); Ark. Code Ann. § 5-73-309(7), (8); Cal. Penal Code § 12021(a)(1); Colo. Rev. Stat. § 18-12-203(1)(e), (f); Del. Code Ann. tit. 11, § 1448(a)(3); D.C. Code § 22-4503(a)(4); Fla. Stat. § 790.25(2)(b)(1); Ga. Code Ann. § 16-11-129(b)(2)(F), (I), (J); Haw. Rev. Stat. § 134-7(c)(1); Idaho Code Ann. § 18-3302(1)(e); 720 Ill. Comp. Stat. 5/24-3.1(a)(3); Ind. Code § 35-47-1-7(5); Kan. Stat. Ann. § 21-4204(a)(1); Ky. Rev. Stat. Ann. § 237.110(4)(d), (e); Md. Code Ann., Public Safety, 5-133(b)(4), (5); Mass. Gen. Laws ch. 140, § 129B(1)(iv); Minn. Stat. § 624.713(1)(10)(iii); Mo. Rev. Stat. § 571.070(1)(1); Nev. Rev. Stat. § 202.360(1)(c); N.H. Rev. Stat. Ann. § 159:3(b)(3); N.J. Stat. Ann. § 2C:58-3(c)(2); N.C. Gev. Stat. § 14-404(c)(3); Ohio Rev. Code Ann. § 2923.13(A)(4); R.I. Gen. Laws § 11-47-6; S.C. Code Ann. § 16-23-30(A)(1); S.D. Codified Laws § 23-7-7.1(3); W. Va. Code § 61-7-7(a)(2), (3).

state legislation "demonstrate[s] that Congress was not alone in concluding that habitual drug abusers are unfit to possess firearms." Yancey, 621 F.3d at 684.

This shared legislative judgment is amply supported by academic research and empirical studies demonstrating the heightened risk to the public safety posed by the possession of firearms by marijuana users. According to the Bureau of Justice Statistics, a 2004 survey found that "32% of state prisoners and 26% of federal prisoners said they had committed their current offense while under the influence of drugs." Bureau of Justice Statistics, Drugs and Crime Facts, http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm [App. at Tab 5]. Marijuana, moreover, was the most frequent drug of choice: a 2002 survey of convicted jail inmates found that marijuana was the most common drug used at the time of the offense, and similar results were found among probationers. Id. Moreover, the Office of National Drug Control Policy's ("ONDCP's") arrestee drug abuse monitoring program, which collects data in 10 cities from males 18 years and older at the point of their involvement in the criminal justice system, found that "[m]arijuana was the most commonly detected drug in all of the . . . sites in 2010." ONDCP, ADAM II 2010 Annual Report, at 20 (2010), available at http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/adam2010.pdf [App. at Tab 6]. In the ten years that ONDCP has been collecting data, "the proportion of arrestees testing positive for marijuana has never been less than 30 percent of the sample in any of the current 10 sites." Id. Indeed, "[i]n 2010, in 9 of the 10 sites, 40 percent or more of the arrestees reported [marijuana] use in the prior 30 days." Id. at 22.

This correlation between marijuana use and crime should be no surprise given the well-documented deleterious effects regular marijuana use has on an individual. Marijuana use is associated with impaired cognitive functioning, dependence, mental illness, and poor motor performance. See ONDCP, Fact Sheet: Marijuana Legalization, at 1 (Oct. 2010), available at http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/marijuana_legalization_fact_sheet_3-3-11.pdf [App. at Tab 7]. Marijuana intoxication "can cause distorted perceptions, difficulty in thinking and problem solving," and "[s]tudies have shown an association between

chronic marijuana use and increased rates of anxiety, depression, suicidal thoughts, and schizophrenia." Id. at 2; see also National Institute of Drug Abuse, Topics in Brief: Marijuana, at 1 (Dec. 2011), available at https://www.drugabuse.gov/sites/default/files/marijuana_3.pdf [App. at Tab 8] (noting that marijuana can have wide-ranging effects, including impaired short term memory, slowed reaction time and impaired motor coordination, altered judgment and decision-making, and altered mood); id. at 2 ("Population studies reveal an association between cannabis use and increased risk of schizophrenia and, to a lesser extent, depression and anxiety.").

The potential risks posed by the firearm possession of someone who uses this mind-altering substance are clear. Moreover, nothing in these studies indicates that the effects of marijuana that make it dangerous for a user to possess a firearm are somehow mitigated when a doctor has indicated that "use of marijuana may mitigate the symptoms or effects of [a chronic or debilitating medical] condition." Nev. Rev. Stat. § 453A.210(2)(a)(2). The documented effects of marijuana use thus corroborate the substantial relationship between § 922(g)(3) and Congress's goal of protecting the public's safety. See Yancey, 621 F.3d at 685 (recognizing that "habitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms.").

In addition, the limited temporal reach of § 922(g)(3) helps ensure that it bears a reasonable fit to the ends that it serves. Unlike most of § 922(g)'s other firearm exclusions, which may operate as lifetime bans, § 922(g)(3) only applies to those who are currently unlawful users. See 27 C.F.R. § 478.11 (defining "unlawful user" so that any unlawful use must have "occurred recently enough to indicate that the individual is actively engaged in such conduct"). Through this feature, "Congress tailored the prohibition to cover only the time period during which it deemed such persons to be dangerous." Carter, 2012 WL 207067, at *7. Moreover, § 922(g)(3) "enables a drug user who places a high value on the right to bear arms to regain that right by parting ways with illicit drug use." Id. The choice is the user's, and nothing in the

Second Amendment "require[s] Congress to allow [the unlawful user] to simultaneously choose both gun possession and drug abuse." Yancey, 621 F.3d at 687.

Especially given the "substantial deference" afforded to "predictive judgments" made by Congress in order to advance the nation's interests, Turner Broad. Sys., 512 U.S. at 665, these sources demonstrate that § 922(g)(3), as applied to marijuana users, satisfies intermediate scrutiny. That Plaintiff has registered to use marijuana for purported medical purposes, as opposed to recreational purposes, does nothing to change the result. Plaintiff may attempt to argue that § 922(g)(3) is unconstitutional as applied to her because she is a responsible marijuana user who poses no genuine threat to public safety. But such an argument is clearly precluded by the Supreme Court's recognition in Heller that "some categorical disqualifications are permissible" and that "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons." Skoien, 614 F.3d at 641 (emphasis added); see also Tooley, 717 F. Supp. 2d at 597 ("Section 922(g)(9) is of course overbroad in the sense that not every domestic violence misdemeanant who loses his or her right to keep and bear arms would have misused them against a domestic partner or other family member. Under intermediate scrutiny, however, the fit does not need to be perfect, but only be reasonably tailored in proportion to the important interest it attempts to further. As such, intermediate scrutiny tolerates laws that are somewhat overinclusive." (citations omitted)); United States v. Miller, 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009) ("[T]he nature of the threat posed by gun violence makes narrowing the scope of gun regulation impracticable."). Nor can Plaintiff succeed on a Second Amendment challenge by "disagree[ing] with Congress' policy decision to link the firearms prohibition in § 922(g)(3) to the Controlled Substances Act." Carter, 2012 WL 207067, at *8. As the Fourth Circuit recognized, "[i]n enacting § 922(g)(3), Congress could have chosen to reexamine the foundations of national drug policy and to identify precisely what kinds of drug users ought to be prohibited from possessing firearms. Instead, it opted, quite reasonably, to connect § 922(g)(3)'s prohibition on the carefully studied and regularly updated

list of substances contained in the Controlled Substances Act." Id. Given that § 922(g)(3)'s means need only be reasonably tailored to its ends, this reasonable legislative judgment is entirely consistent with the Second Amendment.

In sum, a variety of sources, including legislative text and history, empirical evidence, case law, and common sense, demonstrate that § 922(g)(3), as applied to marijuana users, is substantially related to the indisputably important government interest in protecting public safety and preventing crime. It therefore satisfies the requirements of intermediate-scrutiny review, providing yet another reason why Plaintiff's constitutional challenge to § 922(g)(3), as interpreted by ATF, must fail.

B. As Applied to Plaintiff, 18 U.S.C. § 922(d)(3), as Implemented and Interpreted by ATF, Does Not Violate the Second Amendment.

Given that § 922(g)(3) is consistent with the Second Amendment, Plaintiff's challenge to § 922(d)(3), as interpreted by ATF in the September 2011 Open Letter, is similarly unavailing. First, it is important to note that § 922(d)(3)'s restriction is directed toward firearm sellers, not the putative purchaser. Nothing in Heller suggests that individuals have a right to sell firearms; indeed, Heller's language, indicating that "nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms," strongly suggests otherwise. 554 U.S. at 626–27. Along these lines, only one court to date appears to have considered a Second Amendment challenge to § 922(d)(3), and it found that there was no authority indicating that, "at the time of its ratification, the Second Amendment was understood to protect an individual's right to sell a firearm." United States v. Chafin, 423 F. App'x 342, 344 (4th Cir. Apr. 13, 2011) (unpublished). Additionally, the right of "law-abiding, responsible citizens to use arms in defense of hearth and home" that is at the "core" of the Second Amendment, Heller, at 634–35, "does not necessarily give rise to a corresponding right to sell a firearm," Chafin, 423 F. App'x at 344; cf. United States v. 12 200-Foot Reels of Super 8 mm. Film, 413 U.S. 123, 128 (1973) ("We have already indicated that the protected right to possess

obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others.").

This is not to say that restrictions on the sale of firearms can never implicate Second Amendment concerns. Yet, even assuming that to be the case, § 922(d)(3) still cannot run afoul of the Second Amendment because, for all the reasons discussed above, the unlawful drug users who are precluded from acquiring firearms by the statute's operation may constitutionally be prohibited from possessing firearms. In other words, given that it is consistent with the Second Amendment for § 922(g)(3) to prohibit unlawful drug users from possessing firearm, § 922(d)(3) cannot violate the Second Amendment simply because it blocks that same group from acquiring firearms.

To be sure, in addition to banning the sale of firearms to individuals who are known unlawful drug users, § 922(d)(3) also prohibits the sale of firearms to individuals who the seller has reasonable cause to believe are unlawful drug users, including individuals like Plaintiff who have affirmatively registered to use marijuana. Nothing in this restriction, however, violates the Second Amendment. Those who hold state-issued medical marijuana cards are either unlawful drug users or are holding cards that serve them no purpose. Plaintiff has a choice: she can either retain her Nevada-issued medical marijuana card and forfeit the right to acquire a firearm, or she can refrain from using marijuana, return her card to the State, and regain the right to acquire a firearm. Given that Plaintiff has chosen to keep her card, it is reasonable to infer that she has done so in order to use marijuana. Having made that decision, the "Second Amendment . . . does not require Congress to allow [her] to simultaneously choose . . . gun possession." Yancey, 621 F.3d at 687.[14] As a result, Plaintiff has failed to state a Second Amendment claim against either § 922(d)(3) or ATF's interpretation of that provision.

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[14] Indeed, because Plaintiff's inability to acquire a firearm stems from her own decision to retain her medical marijuana registry card, any injury she suffers is traceable not to Defendants, but to her own decisionmaking, and is therefore insufficient to confer standing to prosecute her claims. See Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[S]elf-inflicted harm doesn't satisfy the basic requirements for standing."); Fire

(*Footnote continued on following page.*)

II. PLAINTIFF'S RIGHT TO EQUAL PROTECTION HAS NOT BEEN VIOLATED.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall. . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although this clause expressly applies only to the States, the Supreme Court has found that its protections are encompassed by the Due Process Clause of the Fifth Amendment and therefore apply to the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954). Count II of the Complaint challenges §§ 922(g)(3) and 922(d)(3), as implemented and interpreted by ATF, under the equal protection component of the Due Process Clause, Compl. ¶¶52–57, but this claim is also without merit.

The equal protection component of the Due Process Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). As a result, "[t]o establish an equal protection violation, [the plaintiff] must show that she is being treated differently from similarly situated individuals." Gonzalez-Medina v. Holder, 641 F.3d 333, 336 (9th Cir. 2011). Plaintiff's equal protection claim appears to be premised on the theory that the United States is treating holders of medical marijuana registry cards differently from other law-abiding citizens. See Compl. ¶ 3 (alleging that "Defendants have prohibited a certain class of law-abiding, responsible citizens from exercising their right to keep and bear arms"); id. ¶ 4 ("Based on the Defendants' interpretation of Section 922(g)(3) of the federal criminal code, the law prohibits law-abiding adults who have obtained medical marijuana cards pursuant to state law from lawfully purchasing" firearms). Yet, Plaintiff's characterization to the contrary, the class of individuals holding state-issued medical marijuana registry cards is not similarly situated to law-abiding citizens. It is entirely reasonable for the government to infer that those individuals who have affirmatively registered to

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Equip. Mfrs. Ass'n v. Marshall, 679 F.2d 679, 682 n.5 (7th Cir. 1982) ("[P]etitioners cannot allege an injury from one of the options where they can choose another which causes them no injury").

use marijuana on the basis of chronic medical conditions are, in fact, marijuana users. And because all users of marijuana are violating federal law, they are not similarly situated to those citizens who are not violating federal law. See Marin Alliance for Med. Marijuana v. Holder, __ F.2d __, 2011 WL 5914031, at *13 (N.D. Cal. Nov. 28, 2011) (finding that those whose drug use violates the Controlled Substances Act are not similarly situated to those whose use is permitted by that law). As a result, Plaintiff's Complaint does not allege that she has been "treated differently from similarly situated individuals," Gonzalez-Medina, 641 F.3d at 336, and it therefore fails to state an equal protection claim.

III. PLAINTIFF MAY NOT PURSUE CLAIMS FOR MONETARY RELIEF AGAINST THE UNITED STATES, ATF, OR THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES.

To the extent that Plaintiff asserts claims against the United States for monetary relief, such claims must be dismissed, as the waiver of sovereign immunity claimed by Plaintiff does not apply to actions for money damages. In seeking monetary relief, Plaintiff does not appear to distinguish between the claims against the individual Defendants in their personal capacities and the claims against the United States, ATF, and the individual Defendants in their official capacities. See Compl. ¶¶ 50, 56 (alleging that Plaintiff has suffered damages "[a]s a direct and proximate result of the foregoing law, policy, practice and/or procedure, as enacted and promulgated by the Defendants"); ¶ 59 ("The Defendants, and each of them, acted in concert to deprive the Plaintiff of her Second and Fifth Amendment rights . . . ." (emphasis added)); ¶ 60 ("As a direct and proximate result of the Defendants' above-described actions, the Plaintiff has suffered and continues to suffer damages . . . ."). Nor does she identify the specific parties from whom she seeks "compensatory and punitive damages" in her prayer for relief. Id. at 10, ¶ 4.

The United States, as a sovereign, is immune from suit unless it has waived its immunity. Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999); Levin v. United States, 663 F.3d 1059, 1061 (9th Cir. 2011). The immunity applies regardless of whether a plaintiff sues the United States, one of its agencies, or one of its officers acting in an official capacity. See Balser

v. Dep't of Justice, Office of U.S. Tr., 327 F.3d 903, 907 (9th Cir. 2003) ("In sovereign immunity analysis, any lawsuit against an agency of the United States or against an officer of the United States in his or her official capacity is considered an action against the United States."). In particular, the United States has not waived its sovereign immunity for damages claims based on constitutional violations. See Dyer v. United States, 166 F. App'x 908, 909 (9th Cir. 2006) ("To the extent [plaintiff] sought damages from the United States for allegedly violating his constitutional rights, his claim was barred by sovereign immunity."); Hamrick v. Brusseau, 80 F. App'x 116, 116 (D.C. Cir. 2003) ("[T]he United States has not waived sovereign immunity with respect to actions for damages based on violations of constitutional rights by federal officials, whether brought against the United States directly . . . or against officers sued in their official capacities . . . .") (internal citations omitted). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." Lane v. Peña, 518 U.S. 187, 192 (1996).

Plaintiff seeks to avail herself of the waiver of sovereign immunity contained in Section 702 of the Administrative Procedure Act. Compl. ¶ 11 (alleging that the United States "is a proper defendant in this action pursuant to 5 U.S.C. § 702"). But this waiver only applies to constitutional claims for non-monetary relief. See 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than monetary damages . . ." (emphasis added)); Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998) ("By its own terms, § 702 does not apply to claims for 'money damages . . . .'"). Accordingly, all claims seeking monetary relief from the United States, ATF, or the individual defendants in their official capacity must be dismissed.

IV. PLAINTIFF'S CONSPIRACY CLAIM AGAINST THE UNITED STATES MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

In addition, to the extent that Plaintiff intends to pursue a common-law conspiracy claim against the United States, this Court should dismiss the claim for Plaintiff's failure to exhaust her

administrative remedies, as well as under the "due care" exception to the Federal Torts Claim Act's waiver of sovereign immunity. Plaintiff asserts a claim for "conspiracy" under Nevada tort law. See Comp. ¶¶ 58-61. Though Plaintiff's claim is against "all Defendants," only the United States will remain as a party to the conspiracy claim following substitution under the Federal Employees Liability Reform and Tort Compensation Act (the "Westfall Act"). As set forth in the accompanying memorandum by the individual defendants, see Memo of Individual Defendants at 13-14, under the Westfall Act, once the Attorney General or his designee certifies that an employee was acting within the scope of employment when the claim arose, the action against the employee in his or her individual capacity "shall be deemed an action against the United States . . . , and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). The Attorney General's designee in this case has made this certification. See Att. A to Memo of Individual Defendants. Therefore, the only remaining party to Plaintiff's tort claim is the United States.

This Court should dismiss the conspiracy claim for lack of subject matter jurisdiction once the United States is substituted as a party.[15] Under the Federal Torts Claim Act, a plaintiff cannot proceed in tort against the United States without first seeking administrative resolution of the claim. 28 U.S.C. § 2675(a). The exhaustion requirement of § 2675(a) is a jurisdictional limitation. See Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996). Here, Plaintiff does not allege that she exhausted her administrative remedies. Therefore, Plaintiff's conspiracy claim against the United States must be dismissed for lack of subject matter jurisdiction. Id. (finding jurisdiction lacking where plaintiff failed to exhaust administrative remedies in tort claim against the United States as Westfall Act substitute). In addition, to the extent that Plaintiff's conspiracy claim challenges the enforcement of 18 U.S.C. §§ 922(d)(3) and (g)(3) and the accompanying provisions of the Code of Federal Regulations, Plaintiff's claim is expressly excluded from

[15] The fact that a claim against the United States must immediately fail following substitution under the Westfall Act does not preclude substitution. See United States v. Smith, 499 U.S. 160, 165-66 (1991); Levin v. United States, 663 F.3d 1059, 1064 (9th Cir. 2011).

coverage under the "due care" exception to the FTCA's waiver of sovereign immunity. See 28 U.S.C. 2680(a) (preserving immunity for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid").[16]

CONCLUSION

For the reasons stated herein, Plaintiff's Complaint should be dismissed in its entirety or, in the alternative, summary judgment should be entered in the favor the United States on all of Plaintiff's claims.

Dated: February 3, 2012

Respectfully submitted,

TONY WEST
Assistant Attorney General

DANIEL G. BOGDEN
United States Attorney

SANDRA SCHRAIBMAN
Assistant Director

/s/ Alicia N. Ellington
ALICIA N. ELLINGTON
JOHN K. THEIS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Rm. 7226

[16] Beyond the jurisdictional bar, Plaintiff's claim must fail under Nevada tort law. In Nevada, a conspiracy requires "the commission of an underlying tort." Boorman v. Nev. Mem'l Cremation Soc'y, Inc., 772 F. Supp. 2d 1309, 1315 (D. Nev. 2011) (citing Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety, 110 P.3d 30, 51 (Nev. 2005) (per curiam), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670, 672 n.6 (Nev. 2008)). As demonstrated herein, see supra at Argument Parts I-II, and in the individual defendants' memorandum, neither the United States nor any of its employees have committed any actionable constitutional tort. In addition, under Nevada law, a plaintiff must prove "an explicit or tacit agreement between the tortfeasors." Azpilcueta v. State of Nev. ex rel. Transp. Auth., 2010 WL 2871073, at *3 (D. Nev. 2010) (citing GES, Inc. v. Corbitt, 21 P.3d 11, 15 (Nev. 2001)). Here, Plaintiff has not alleged any facts to support her conclusory assertion that the Defendants "acted in concert to deprive Plaintiff of her [constitutional] rights." Compl. ¶ 59. The claim fails to rise above mere speculation and accordingly must be dismissed. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Washington, D.C. 20530
Telephone: (202) 305-8550
Facsimile: (202) 616-8460
Alicia.N.Ellington@usdoj.gov
John.K.Theis@usdoj.gov

Attorneys for Defendants the United States of America, ATF, U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert, in their official capacities (collectively, the United States)

PROOF OF SERVICE

I, Alicia N. Ellington, Trial Attorney with the United States Department of Justice, certify that the following individuals were served with **THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** on this date by the below identified method of service:

Electronic Case Filing:

Charles C. Rainey
Rainey Devine, Attorneys at Law
2245 W. Horizon Ridge Pkwy., Ste. 110
Henderson, NV 89052
chaz@raineydevine.com

Attorney for Plaintiff

Zachary Richter
Trial Attorney, Constitutional Torts Staff
United States Department of Justice, Civil Division
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044
Zachary.Richter@usdoj.gov

Attorney for Defendants Eric Holder, B. Todd Jones, and Arthur Herbert in their individual capacities

DATED this 3rd day of February 2012.

/s/ Alicia N. Ellington
ALICIA N. ELLINGTON
Trial Attorney
United States Department of Justice

CHARLES C. RAINEY, ESQ.
Nevada Bar No. 10723
RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89052
Telephone: (702) 425.5100
Facsimile: (888) 867.5734
chaz@raineydevine.com
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

S. ROWAN WILSON, an individual,

Plaintiff,

v.

ERIC HOLDER, Attorney General of the United States, et al.,

Defendants.

Case No. 2:11-cv-1679-GMN-(PAL)

PLAINTIFF'S RESPONSE TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff S. ROWAN WILSON (the "Plaintiff") by and through her counsel Charles C. Rainey of the THE LAW FIRM OF RAINEY DEVINE, and hereby submits her OPPOSITION TO THE UNITED STATES'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT. This Opposition and Cross-motion is made and based upon the Memorandum of Points and Authorities attached hereto, the pleadings and papers on file herein, and any arguments to be had at the hearing of this matter.

DATED: March 9, 2012.

Respectfully submitted:
THE LAW FIRM OF RAINEY DEVINE

By: /s/ Chaz Rainey
Charles C. Rainey, Esq.
Nevada Bar No. 10723
8915 South Pecos Road, Ste. 20
Henderson, Nevada 89052
Telephone: +1.702.425.5100
Facsimile: +1.888.867.5734
chaz@raineydevine.com
Attorney for Plaintiff

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

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RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

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8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

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RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

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8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

UNITED STATES CONSTITUTION

STATUTES

FEDERAL RULES AND REGULATIONS

LEGISLATIVE MATERIAL

MISCELLANEOUS

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

INTRODUCTION

Granting the Defendant's current motion would undermine the fundamental individual liberties guaranteed by the United States Constitution and merely serve to bolster the ignorant misperceptions and prejudices held against medical cannabis patients.

The Defendants admit to deliberately seeking to deprive all medical cannabis patients of their constitutional right to keep and bear arms. The Defendants admit that BATFE issued a letter to each and every federally licensed firearms dealer, specifically banning the sale of firearms to any person possessing a state issued medical marijuana registry card. This letter was issued without providing any notice to or consultation with medical marijuana patients. The Defendants provided no hearing to adjudicate whether the Plaintiff, or any other medical cannabis patient, was, in fact, an "unlawful user" of a controlled substance. The Defendants failed to provide any meaningful opportunity for the Plaintiff or any other medical cannabis patent to be heard on the matter. Instead, the Government simply denied the Plaintiff her constitutional rights.

The Government has taken the untenable position that even within a State like Nevada, where a patient's right to grow and use medical cannabis is guaranteed by the State's Constitution, any law-abiding holder of a state-issued medical marijuana registry card is automatically prohibited from exercising her Second Amendment rights.

The Defendants violated the Plaintiffs right to procedural due process, depriving her of her constitutional rights without any notice, hearing or opportunity to comment. The Defendants violated the Plaintiff's right to equal protection, by treating her and others with certain medical ailments differently than similarly situated persons. The Defendant violated the Plaintiff's Second Amendment rights by wrongfully categorizing her as an "unlawful user" of a controlled substance and refusing her the right to purchase or possess a firearm. Meanwhile, the very law that the Defendants seek to promulgate is itself an unconstitutional abuse of individual rights.

The facts of this case are not in dispute; and the Plaintiff is entitled to judgment as a matter of law. Therefore, the Plaintiff respectfully requests that this Court DENY the

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

Defendants' motion to dismiss, DENY the Defendant's motion for summary judgment, and properly GRANT summary judgment for the Plaintiff.

STATEMENT OF FACTS

There are no material facts in dispute in this matter. The Defendants' Motion does not dispute any of the factual allegations contained in Plaintiff's Complaint. Instead, the Defendants' Motion only argues the legal conclusions reached in Plaintiff's Complaint. A statement of undisputed facts is filed concurrently herewith.

LEGAL STANDARDS

The Defendants' Motion purports to be a Motion to Dismiss made pursuant to Federal Rules of Civil Procedure 12(b)(1)[1] and 12(b)(6) and, in the alternative, a Motion for Summary Judgment made pursuant to Federal Rule of Civil Procedure 56. However, Defendants' Motion does not contain a statement of the legal standards applicable to either Rule 12(b) motions to dismiss or Rule 56 motions for summary judgment.

Rules 12(b)(1) and 12(b)(6) provide, respectively, that defenses of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted can be raised by motion before a responsive pleading is filed. Fed. R. Civ. Pro. 12(b). Generally, in considering a Rule 12(b)(6) motion to dismiss, the Court may only look to the face of the plaintiff's complaint and must accept all factual allegations as true and draw all reasonable inferences in favor of plaintiff. "If, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. Pro. 12(d).

Rule 56 provides that "[a] party may move for summary judgment, identifying each claim or defense . . . on which summary judgment is sought." Fed. R. Civ. Pro. 56(a). Rule 56 further provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*. Material facts are only those facts "that might affect the outcome of the suit under

[1] The only claim to which Rule 12(b)(1) applies is Plaintiff's conspiracy claim. As will be discussed subsequently, Plaintiff will agree to the dismissal of her conspiracy claim.

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8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

the governing law." *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 247, 106 S.Ct. 2505 (1986). Disputes as to non-material facts and disputes as to legal questions cannot preclude summary judgment. *See id*.

Here, the Defendants' Motion should be considered as a motion for summary judgment rather than a motion to dismiss because the Defendants rely on matters outside of the Complaint throughout the Motion. These extrinsic matters cannot be separated from the Motion so as to allow the Court to consider the Motion under Rule 12(b). Furthermore, the Defendants Motion does not even attempt to argue that Plaintiff's Complaint is deficient on its face; the Motion only argues that Defendants are entitled to judgment as a matter of law based on previous court decisions. As such, the Defendants' Motion is, for all intents and purposes, a motion for summary judgment and not Rule 12(b)(6).

ARGUMENT

I. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS.

The Fifth Amendment of the United States Constitution provides, in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. V. Although the Defendants' Motion only addresses the Plaintiff's Equal Protection claims, the Plaintiff's Complaint also sets forth both procedural and substantive due process claims pursuant to the Fifth Amendment.

A. Defendants Have Violated Plaintiff's Right to Procedural Due Process by Depriving her of a Fundamental Constitutional Right Without Any Notice, Hearing or Opportunity to Comment.

The United States Constitution requires that whenever a governmental body acts to injure an individual, that act must be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved. "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." *Ex Parte Wall*, 107 U.S. 265, 289 (1883).[2] With respect to

[2] Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. V. McGrath*, 341 U.S. 123, 163 (1951), further elaborated upon this understanding as follows:

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

action taken by administrative agencies, the Supreme Court has held that notice must be given and a hearing must be held before a final order becomes effective. *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152, 153 (1941).

For example, the Supreme Court has held that "due process requires an adequate hearing before termination of welfare benefits." *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). When the Constitution requires a hearing, the hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Generally, these provisions require that the hearing be held before a tribunal which meets currently prevailing standards of impartiality and a party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to meet them. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950); *see also Goldberg*, 397 U.S. at 267-268. Furthermore, those who are brought into contest with the government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon the proposal before the final command is issued. *Margan v. United States*, 304 U.S. 1, 18-19 (1938).

Here, the Defendants have deprived the Plaintiff of a fundamental right without any notice or opportunity to be heard. The Defendants have adopted and are enforcing a policy, through their Open Letter, whereby a distinct group of individuals are automatically precluded from exercising their fundamental rights under the U.S. Constitution based solely upon an FFLs reasonable belief that these persons are exercising their State granted rights. As will be discussed in more detail below, the Supreme Court recently held that the Second Amendment includes a fundamental individual right to possess a handgun in one's home for self-defense. *See District of Columbia v. Heller*, 128 S.Ct. 2783 (2008). The Defendants have conclusively

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> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished - these are some of the considerations that must enter into the judicial judgment."

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
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determined that the mere fact that an FFL is aware a "potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then [the FFL has] 'reasonable cause to believe' that the person is an unlawful user of a controlled substance" and **must** deny the transfer of firearms or ammunition to that person. *Open Letter*.

However, as will be discussed in more detail subsequently, medical marijuana users do not fit the intended definition of "unlawful users." Here, the Plaintiff obtained a valid state medical marijuana registry card in May of 2011, approximately four months before the Defendants issued their Open Letter. Prior to the issuance of the Open Letter, Plaintiff was not given any opportunity to comment on the policy set forth in the Open Letter. Additionally, Defendants have not even provided a post-termination procedure whereby persons who hold medical marijuana registry cards can argue that they are not "unlawful users of or addicted to" a controlled substance. While the exact number of medical marijuana users is uncertain, it is estimated that roughly 600,000 persons in the U.S. are using medical marijuana in the nine states where registration is mandatory. By virtue of their issuance and enforcement of the policy set forth in the Open Letter, the Defendants have willfully deprived a large class of U.S. citizens, including the Plaintiff, of their fundamental rights in direct violation of the procedural requirements of the Due Process Clause.

B. Defendants Have Violated Plaintiff's Right to Substantive Due Process Because the Government's Interest is Outweighed by the Plaintiff's Right to Treat her Medical Condition in Accordance with her Doctor's Recommendation.

The right to substantive due process concerns the right to "liberty" under the Fifth and Fourteenth Amendments. Essentially, the question of substantive due process asks whether a person is free to engage in certain conduct in the exercise of their liberty under the Due Process Clause. *See Lawrence v. Texas*, 539 U.S. 558, 564 (2003). The broad substantive reach of liberty under the Due Process Clause has been noted in a number of U.S. Supreme Court Cases. *Id*.; *see also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Griswold v. Connecticut*, 381 U.S. 479 (1965). "[T]he Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Lawrence*, 539 U.S. at 565. "[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is not a series

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of isolated points. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Albright v. Oliver*, 510 U.S. 266, 287 (1994) (concurring opinion), *quoting Poe v. Ullman*, 367 U.S. 497, 543 (1961) (internal quotations omitted).

The U.S. Supreme Court has found that:

> "[Matters] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Lawrence, 539 U.S. at 574, *quoting Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572, *quoting County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring). For example, in 1955 the American Law Institute's Model Penal Code made it clear its position that criminal penalties should not be imposed on consensual sexual relations conducted in private. *Id*. The ALI based its decision on the grounds that: "(1) [t]he prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail." *Id*. *quoting* ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955).

"In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the liberty of the individual and the demands of organized society." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) *see also Mills v. Rogers*, 457 U.S. 291, 299, (1982). "[T]he ultimate question is whether sufficient justification exists for the intrusion by the government into the realm of a person's 'liberty, dignity, and freedom.'" *Compassion in Dying v. State of Washington*, 79 F.3d 790, 799 (9th Cir. 1996), *quoting Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287, 289, 110 S.Ct. 2841, 2856, 2857 (1990) (O'Connor, J., concurring). "If the balance favors the state, then the given statute--whether it regulates the exercise of a due process liberty interest or prohibits that exercise to some

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degree--is constitutional. If the balance favors the individual, then the statute--whatever its justifications--violates the individual's due process liberty rights and must be declared unconstitutional, either on its face or as applied." *Id*.

Here, the Plaintiff has a substantive right to treat her medical condition in the manner recommended by her physician and which she and her physician agree is the beat course of treatment for her. The right to choose a course of medical treatment is one of the most intimate and personal choices a person can make. Furthermore, the ability to choose a course of medical treatment is central to the fundamental rights of personal dignity and autonomy. Although the Defendants will argue that cannabis has no accepted medical value and thus is not a treatment option available to Plaintiff, a majority of states have adopted or are in the process of adopting legislation which recognizes the medicinal values of cannabis and legalizes its use for the treatment of various health conditions. Currently, sixteen (16) states and the District of Columbia have legalized the use of medical cannabis.[3] As of February 13, 2012, an additional eighteen (18) states have pending legislation that would legalize the use of medicinal cannabis.[4] Despite the Defendants' refusal to recognize the medical benefits of cannabis, the growing trend indicates that physicians believe cannabis has medicinal value and the public believes medical cannabis is a viable course of treatment. Even the Drug Enforcement Agency has admitted that the active ingredient in marijuana, THC, is valuable for relieving nausea and vomiting and providing pain management.[5] Marinol, a pharmaceutical derived from cannabis, is available by prescription in the U.S. *Id*. The federal government even assisted in the research on Marinol. Marinol, which has been available since 1985, was originally classified as a Schedule II substance but was moved to Schedule III in 1999. Based upon the FDA and DEA's approval of the use of Marinol, the argument that cannabis has no medical use is without merit. Pursuant to the substantive liberty rights imparted by the Due Process Clause, the Defendants cannot deny the Plaintiff her right to choose a viable course of treatment recommended by her

[3] *See* 16 Legal Medical Marijuana States and DC – Laws, Fees, and Possession Limits, available at http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.

[4] *See* 18 States with Pending Legislation to Legalize Medical Marijuana (as of Mar. 8, 2012), available at http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481.

[5] *See* "Medical" Marijuana – The Facts, available at www.justice.gov/dea/ongoing/marinol.html.

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physician.

Additionally, the same factors that militated against the criminalization private consensual sexual conduct of adults support the understanding that a person's fundamental rights should not be deprived based solely upon her use of a medical treatment prescribed by her physician. The policies adopted and implemented by the Defendants, as set forth in their Open Letter undermined respect for the law by penalizing conduct many people engage in. As noted above, it is estimated that roughly 600,000 were using medical marijuana as of January 2009. The policies also regulate private conduct not harmful to others. It does not appear that there is any scientific research indicating that persons using medical marijuana are any more likely that non-users to commit any crimes, let alone gun crimes. Indeed, Defendants have cited to no evidence indicating that holders of medical marijuana registry cards are likely to commit the types of crimes the Gun Control Act seeks to prevent or any other crimes for that matter. The Defendants policies are also arbitrarily enforced and thus invited the danger of blackmail, among other things. An organized society does not require that all holders of medical marijuana registry cards be prohibited from purchasing firearms and ammunition. The Defendants have failed to show that sufficient justification exists for the intrusion by the government into the realm of Plaintiff's liberty, dignity, and freedom to follow a course of medical treatment recommended by her physician. As such, the Defendants policies violate the Plaintiff's substantive liberty interests granted by the Due Process Clause of the Fifth Amendment.

II. DEFENDANTS HAVE VIOLATED PLAINTIFF'S RIGHT TO EQUAL PROTECTION BY TREATING HER DIFFERENTLY THAN SIMILARLY SITUATED INDIVIDUALS.

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law." This provision of the Fourteenth Amendment has been held by the United States Supreme Court to apply to the federal government by virtue of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954). The equal protection component of the Due Process Clause "is essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause "keeps governmental decision makers from treating differently persons who are in all relevant aspects

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alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see also Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002) ("The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike.") It does not appear that any federal appellate court has yet determined whether users of drugs which are lawful pursuant to state law but unlawful pursuant to federal law are similarly situated to person who use drugs other than those prohibited by the federal law.

Here, Defendants have violated Plaintiff's equal protection rights by treating Plaintiff differently from persons to whom she is similarly situated. The Plaintiff is similarly situated to other law-abiding citizens who are attempting to follow a course of treatment prescribed by their doctors for a chronic medical condition. Defendants attempt to argue that the class of individuals holding state-issued medical marijuana registry cards is not similarly situated to other law abiding citizens because the government may infer that holders of medical marijuana registry cards are "unlawful users of or addicted to" illegal substances. However, persons who obtain a valid state registry card by obtaining a physician's recommendation and use medicinal marijuana solely as recommended by the physician and within the limitations of state law are fundamentally different that other unlawful drug users. Additionally, medical marijuana registry cardholders should be considered as similarly situated to users of the FDA-approved drug Marinol, which contains the same active ingredient as marijuana. It does not appear that the Defendants have issued any letters to FFLs indicating that an awareness that a person is taking Marinol is grounds for the denial of the purchase of a firearm or ammunition.

Furthermore, even if medical marijuana registry cardholders are not considered similarly situated to non-registry cardholders because of presumption that registry cardholders are violating federal law, it is undeniable that registry cardholders are similarly situated to persons using medical marijuana in states where registry is not required. Several states, such as California, have provided for the legal use of medicinal marijuana without the necessity of registering with the state or obtaining a state-issued registry identification card. The Defendants' policy set forth in the Open Letter thus discriminates against persons who live in a state that requires a registry identification card because any knowledge of the person's

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possession of that card can be used as conclusive evidence to deny their attempt to purchase firearms and/or ammunition. Meanwhile, persons using medical marijuana in a state that does not issue registry identification cards will avoid the policies set forth in the Open Letter simply because their state does not issue registry identification cards. As such, the policies adopted and promulgated by the Defendants, as set forth in the Open Letter, violate the Plaintiff's right to equal protection.

III. DEFENDANTS HAVE VIOLATED PLAINTIFF'S SECOND AMENDMENT RIGHTS.

A. Plaintiff is Not an "Unlawful User" of or "Addicted To" a Controlled Substance Because Congress Did Not Intend to Include Medical Cannabis Patients in those Categories.

Persons holding validly issued state registry cards do not fall within the meaning of "unlawful user of or addicted to" a controlled substance as that phrase was understood by Congress. The Controlled Substances Act, 21 U.S.C. § 802, defines the term "addict" as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1). However, the Controlled Substances Act does not define the term "unlawful user." *See* 21 U.S.C. § 802. The ATF has adopted a regulation, codified at 27 C.F.R. § 478.11, which defines the term "unlawful user" and which also attempts to expand the definition of "addict." However, the text and context of the statute itself are insufficient to provide the necessary explanation for the term. As such, it is appropriate to review the legislative history to discern the intent of the legislature.

Nothing in the legislative history of the Controlled Substances Act specifically addresses whether medical cannabis patients were intended to be considered "unlawful users." However, the prevention of crime theme that is prevalent in the legislative history of 18 U.S.C. § 922(g) indicates that Congress did not intend for law-abiding medical cannabis patients to be included in the definition of "unlawful user." Congress enacted the Gun Control Act in 1968 with the explicit purpose of "provid[ing] support to Federal, State, and local law enforcement officials in their fight against crime and violence." The Gun Control Act, Pub.L. 90-618, Sec. 101 (1968). Specifically, the Act and its subsequent amendments were aimed at combating gun crimes and

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narcotics trafficking. To achieve this end, Congress intended to prevent drug addicts and other criminals from having access to firearms. *See* e.g. 132 Cong. Rec. H1689-03 (April 9, 1986) ("What the bill will do is make it a little harder for drug addicts, muggers, deranged individuals, and other criminal elements to procure handguns."). Congress has also made it very clear that the purpose of this legislation is not to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms. The Gun Control Act, Pub.L. 90-618, Sec. 101 (1968). As such, an interpretation of 18 U.S.C. § 922(d) and (g) that extends the firearm prohibition to lawful medical cannabis use violates Congressional intent.

"The principal purpose of the federal gun control legislation . . . was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Huddleston v. United States*, 415 U.S. 814, 824 (1974), quoting S.Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968). U.S. Code Cong. & Admin. News 1968, p. 4410. Prior to amendment in 1986, subsection (g)(3) against possessing firearms or ammunition applied to a person "who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 473(a) of the Internal Revenue Code of 1954." In 1986, the 99th Congress emended the language of subsection (g)(3) as part of the Firearms Owners' Protection Act, Pub.L. 99-308, § 102(6)(B) (H.R. 4332, 99th Congress), removing the provision's direct reference to "marijuana" and made subsection (g)(3) applicable to a person "who is an unlawful user of or addicted to a controlled substance as defined in the Controlled Substances Act." The House Judiciary Committee Report details the purpose of this change. Firearms Owners' Protection Act, H.R. Rep. No. 495, 99th Cong., 2nd Sess, 1986 (Mar. 14, 1986). Congress "modernized" 18 U.S.C. § 922(g) by closing loopholes for users of new drugs that had become prevalent in the 1980s.

Federal courts have not yet ruled on whether a medical marijuana patient may possess a handgun. However, the Ninth Circuit has held that in order to sustain a conviction under 18 U.S.C. § 922(g)(3), the government must prove "that the defendant took drugs with regularity,

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over an extended period of time, and contemporaneously with his purchase or possession of a firearm." *United States v. Purdy*, 264 F.3d 809, 812-813 (9th Cir. 2001). In *Purdy*, the defendant had used cocaine, non-medicinal marijuana, and methamphetamines over the course of four years and contemporaneously with his possession of a firearm. *Id*. at 810-11. In *United States v. Williams*, 216 F.Supp.2d 568 (E.D. Va. 2002), the defendant was found to have possessed a firearm after smoking half of a marijuana cigarette, which was also in his possession. The court concluded that Williams was not guilty of violating 18 U.S.C. 922(g) even though he had obviously used a controlled substance at the same time that he had possessed a firearm because the government must prove that a defendant has a pattern of use, continuous use, or prolonged use of a controlled substance while in possession of a firearm. *Id*. at 576. The court concluded that the government must prove that, while in possession of a firearm, the defendant used narcotics so frequently that his use was an addiction and in such quantities as to lose the power of self-control and pose a danger to the public. *Id*. at 573.

In *Gonzalez v. Raich*, the United States Supreme Court held that application of the Controlled Substances Act's provisions criminalizing the manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes does not violate the Commerce Clause. 545 U.S. 1, 125 S.Ct. 2195 (2005). As such, *Raich* merely ruled on the narrow issue of whether the federal government had the power to regulate intrastate activity under the Commerce Clause. In *United States v. Oakland Cannabis Buyer's Cooperative*, the Ninth Circuit reversed an injunction of distribution of medical cannabis under the Controlled Substances Act holding that the distributors had a medical necessity defense. 190 F.3d 1109 (1999). Although the Supreme Court ultimately reversed the Ninth Circuit, the concurring opinion points out that "[m]ost notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here." *United States v. Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483, 501 (2001).

Furthermore, the Federal Government has conceded that persons complying with state medical marijuana laws are not "unlawful users" and Defendants are estopped from asserting

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otherwise. On October 19, 2009, United States Deputy Attorney General David W. Ogden issued a memorandum to all United States attorneys in those Federal Districts where the States have enacted medical marijuana laws entitled "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana."[6] The Ogden memorandum, which was specifically issued to Defendant B. Todd Jones, states in relevant part that the attorneys "should not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." Subsequently, then Attorney General Ashcroft relied upon the position set forth in the Ogden memorandum to reach a stipulation and dismissal in a case filed by the County of Santa Cruz, California. Having asserted that the federal government would no longer interfere with medical cannabis patients who are in compliance with state medical marijuana laws in that case, the federal government would be estopped from claiming otherwise here.

Additionally, the United States Supreme Court recently denied certiorari to the Oregon case of *Willis v. Winters*, 350 Or. 299, 253 P.3d 1058 (Or. 2011). *See* Order List: 565 U.S.[7]. In *Willis*, the Oregon Supreme Court found that Oregon sheriffs could not deny concealed handgun permits to medical marijuana users despite 18 U.S.C. § 922. The Supreme Court's decision not to review this decision indicates that the Oregon court's decision and reasoning should stand.

The overwhelming majority of the evidence indicates that Plaintiff, as a holder of a medical marijuana registry card issued by her state, is not the type of person intended to be precluded from obtaining a firearm under 18 U.S.C. § 922(g)(3). Plaintiff is not a dangerous criminal, but rather a woman who has suffered from chronic and debilitating pain for the last thirty (30) years. Plaintiff cannot automatically be presumed to be an "unlawful user of or addicted to" a controlled substance. The mere fact that the Plaintiff possesses a state issued marijuana registry card issued by her state does not meet the government's burden of proof for a criminal conviction yet alone a deprivation of her fundamental rights. Even if the Defendants

[6] Available at http://blogs.usdoj.gov/blog/archives/192.
[7] Available at (http://www.supremecourt.gov/orders/courtorders/010912zor.pdf)

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met the required level of prove and showed that Plaintiff took illegal drugs with regularity, over an extended period of time, and contemporaneously with her purchase or possession of a firearm, the Defendants should be estopped from asserting their position that her registry card deems her an "unlawful user of or addicted to marijuana" based upon the federal government's affirmation of the Ogden memorandum in a previous case. As such, Plaintiff should not be considered an unlawful user of or addicted to a controlled substance.

B. 18 U.S.C. § 922(g)(3) is Unconstitutional.

18 USC § 922(g)(3) is an exceptionally over-broad statute that, if actually enforced to its full effect, would preclude roughly half of adult-aged US citizens (more than one hundred fifty million people) from possessing, purchasing, transporting or even receiving any firearm or ammunition.[8] In effect, the law, if fully enforced, would deprive more than half of our adult-aged citizens of their fundamental constitutional right to keep and bear arms. The extraordinary breadth of this law renders it unenforceable and wholly unconstitutional.

18 USC § 922(g)(3) reads as follows:

> (g) It shall be unlawful for any person—
> […]
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 USC § 802));
> […]
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Meanwhile, 21 USC § 802(6), the law defining "controlled substances," reads as follows:

> The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms

[8] *See* TABLE 1.1A – TYPES OF ILLICIT DRUG USE IN LIFETIME, PAST YEAR, AND PAST MONTH, compiled in 2010 by the Substance Abuse and Mental Health Services Administration, available at: http://www.samhsa.gov/data/NSDUH/2k10ResultsTables/Web/HTML/Sect1peTabs1to46.htm#Tab1.1A *See* (states that 38,806,000 Americans had taken illicit drugs within the last twelve months and 119,508,000 Americans had taken illicit drugs within the last twelve months); *see also* 2010 UNITED STATES HEALTH REPORT, as compiled by the National Center for Health Statistics, available at http://www.cdc.gov/nchs/data/hus/hus10.pdf (reporting that nearly half of all persons within the United States have taken prescription drugs within the last 30 days).

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> are defined or used in subtitle E of the Internal Revenue Code of 1986.

Accordingly, under 18 USC § 922(g)(3), any person that is an "unlawful user of or addicted to" any drug within Schedules I, II, III, IV or V is prohibited from exercising his/her Second Amendment rights. Those schedules encompass not only illegal narcotics, but also ANY prescription drug and even some over the counter medicines, such as Robitussin. *See* 21 USC § 812; *see also* 21 CFR §§ 1308.01 – 1308.49.

The phrase "unlawful user of or addicted to" is disturbingly broad and fails to state with reasonable particularity the specific group of persons targeted. If carried to its extreme, the phrase could include roughly half of the US population. Even if narrowly read, the category of person includes, at the very least, thirty-eight million people,[9] more than twelve percent of the total United States population.

Moreover, the statutory definition of "addict," already broadly drawn under 21 USC § 802(1), is stretched to its absolute limits through ATF regulation. Under 21 USC § 802(1), the term "addict" is defined as any individual who either (1) habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or (2) who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. Notice that the second category of "addict" is actually quite broad and could even include persons addicted to lawfully prescribed medicines. For instance, a person taking Ritalin to treat his/her Attention Deficit Disorder would likely fall within this category. Ritalin is a physically addictive substance that may be prescribed for daily ongoing use.[10] If taken for a prolonged period of time, the physical addiction to Ritalin could be such that the person taking the drug is no longer able to control the addiction, thereby falling within the second category of addict, defined under 21 USC § 802(1). As evidenced by the Ritalin example above, this definition of "addict" can be very broadly interpreted to include many tens of millions of Americans who lawfully take prescribed pharmaceuticals.

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[9] *Id.*

[10] Methylphenidate, the systematic name for Ritalin, is a Schedule II controlled substance, due to its high likelihood for addictive potential. *See* 21 CFR §§ 1308; Data reported by the DEA, and collected by IMS Health (a national prescription auditing firm) shows that as of 2000, doctors in the United States were writing approximately 11 million prescriptions for Ritalin annually.

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Surprisingly, the ATF's regulations employ this much broader definition of addiction from§ 802(1), then go even further to deliberately push the interpretation of the definition as far as it can go. Under 27 C.F.R. § 478.11, the term "[u]nlawful user of or addicted to any controlled substance" is defined as follows:

> A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time […].

In the following pages, the Plaintiff will provide the analysis necessary to demonstrate that the expansive scope of 18 U.S.C. § 922(g)(3) renders it unenforceable and unconstitutional. First, the Plaintiff will highlight the deeply flawed aspects of *United States v. Dugan*, the case principally relied on by the Defendants. Second, the Plaintiff will show how existing Supreme Court case law requires that § 922(g)(3) be analyzed under a strict scrutiny analysis. Then, in applying that strict scrutiny analysis, the Plaintiff will demonstrate how the subject law falls far short of being constitutional. Finally, the Plaintiff will demonstrate how, even if this Court were to apply the lesser intermediate scrutiny, § 922(g)(3) still fails to pass constitutional muster.

1. The Ninth Circuit's Opinion in *Dugan* is Wrong and Must be Overturned.

In seeking to validate the constitutionality of § 922(g)(3), the Defendants rely heavily, almost exclusively, upon the Ninth Circuit case *United States v. Dugan*. 657 F.3d 998 (9th Cir 2011). However, *Dugan* is a deeply flawed opinion that must be overturned. Consisting of just four short paragraphs, *Dugan* makes the sweeping assertion that § 922(g)(3) is constitutional, without even bothering to examine the law under a strict scrutiny, intermediate scrutiny or even rational basis analysis. Indeed, *Dugan* provides no substantive analysis of the law's

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constitutionality and appears to base its entire decision upon two similarly brief and similarly flawed opinions from sister circuit courts.[11]

Meanwhile, the facts of *Dugan* are so prejudicial that they fail to provide a proper framework for analyzing the constitutionality of § 922(g)(3). In *Dugan,* the party challenging the law's constitutionality, Kevin Dugan, was arrested during a domestic violence complaint, when officers discovered an illegal marijuana "operation" in Mr. Dugan's home. Mr. Dugan was the very sort of person that § 922(g)(3) was designed for—a dangerous criminal. Based on the facts represented in the *Dugan* opinion, Kevin Dugan was possibly a wife beating, drug dealing, drug using, arms dealer. As the old saying goes: "Bad facts make bad law."

Indeed, § 922(g)(3) doesn't just affect the rights of the Kevin Dugans of this world; this law threatens the fundamental constitutional rights of nearly half of the U.S. population.[12] Even though § 922(g)(3) is intended to keep guns out of the hands of a small subset of the population, the law radically over-reaches such that it poses a substantial threat to any person who is a chronic user of any drug, from marijuana to Robitussin, a group of people that constitute anywhere from twelve percent (12%) to fifty percent (50%) of the total U.S. population. For the foregoing reasons, the *Dugan* Opinion is simply wrong and MUST be overturned.[13]

2. The Constitutionality of 18 U.S.C. § 922(g)(3) Must be Examined Under a Strict Scrutiny Standard Because it Seeks to Deprive Individuals of a Fundamental Constitutional Right.

In *DC v. Heller*, the Supreme Court finally made clear that the Second Amendment is a "fundamental" individual right. *District of Columbia v. Heller,* 554 US 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).[14] Recently considering the applicability of the Second Amendment to the States, the Supreme Court reiterated this notion in *McDonald v. City of Chicago*, where it stated

[11] *Dugan* cites to only two cases in support of its proposition that 922(g)(3) is constitutional, *U.S v. Seay*, 620 F.3d 919 (8th Cir 2010), and *U.S. v Yancey*, 621 F.3d 681 (7th Cir 2010).

[12] *Supra* note 8.

[13] The Plaintiff acknowledges and understands that, in accordance with the principle of *stare decisis*, this Court is somewhat limited in its ability to overturn *Dugan*. Nevertheless, in the event of any appeal of this matter, the Plaintiff will be seeking to overturn the *Dugan* decision.

[14] Specifically, the Court stated that "By the time of the founding [of the United States], the right to have arms had become fundamental for English subjects" then further states that the Second Amendment was "a codified right 'inherited from our English ancestors,'" 128 S. Ct. 2783 (*quoting Robertson v. Baldwin*, 165 U. S. 275, 281 (1897)).

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"[i]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." 130 S.Ct. 3020, 3042 (2010) (*emphasis added*).

Although the *Heller* court failed to state the specific standard of analysis, prior Court precedent makes clear that where the government seeks to deprive individuals of a fundamental right, as is the case with § 922 (g)(3), the constitutionality of the law must be examined under a strict scrutiny analysis, ensuring that the law is narrowly tailored to effectuate a compelling government interest and that no less restrictive means exists. *See e.g.*, *Graham v. Richardson Sailer v. Leger*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988); *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (*Scalia dissenting* notes that "strict scrutiny will be applied to the deprivation of whatever sort of right we consider 'fundamental.'"). "Even though the governmental purpose [may] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker Carr v. Young*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). "Where legislative abridgment of 'fundamental personal rights and liberties' is asserted, 'the courts should be astute to examine the effect of the challenged legislation." *Id.* (*quoting Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 151 (1939). "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.'" *Schneider*, 308 U.S. at 161.

Here, 18 USC § 922(g)(3) seeks to deprive individuals of their Second Amendment right to keep and bear arms. This federal criminal statute renders it a crime for any person that is an "unlawful user of or addicted to" a "controlled substance" to possess a firearm. It is a direct attack on a fundamental constitutional right. As such, the law's constitutionality must be examined under a strict scrutiny standard.

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3. 18 U.S.C. § 922(g)(3) is Unconstitutional, Under a Strict Scrutiny Standard, Because the Law is Not Narrowly Tailored to Satisfy a Compelling Government Interest and the Government has Far Less Restrictive Means of Achieving its Goals.

18 USC § 922(g)(3) plainly fails to survive a strict scrutiny analysis. To survive a strict scrutiny analysis, the law must:

(1) further a compelling government interest;

(2) be narrowly tailored to achieve that compelling government interest; and

(3) be the least restrictive means for achieving that compelling government interest.

See e.g. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Kramer v. Union Free School District*, 395 U. S. 621, 395 U. S. 627 (1969); *Griswold v. Connecticut*, 381 U.S. at 381 U. S. 485 (1965).

Section 922(d)(3) fails on prongs two and three of the above-cited test: the law is not narrowly tailored to achieve the intended government interest, nor is it the least restrictive means of achieving the intended government interest.

As noted by the Defendants, in their most recent Motion, § 922(d)(3) was drafted with the intent of keeping firearms "out of the hands of presumptively risky people." DEF MOTION TO DISMISS, p. 3, line 24 (*quoting Dickerson v. New Banner, Inc.,* 460 U.S. 103, 112, n. 6 (1983). At the heart of § 922(g)(3) is a desire to keep firearms out of the hands of dangerous individuals – individuals that might use guns in a dangerous manner that could harm others. However, in its attempt to deter firearm possession amongst dangerous persons, § 922(g)(3) takes a scorched earth approach, seeking to deprive Second Amendment rights to a phenomenally large contingent of the American population.

18 USC § 922(g)(3) is just too impossibly broad to survive strict scrutiny (or intermediate scrutiny for that matter). The law aims to deprive tens of millions of people of their constitutional right to keep and bear arms, just to target an infinitesimal subset of potentially dangerous individuals. Even if § 922(g)(3) was solely concerned with illicit substance abuse (which it is not) and even if we were to assume that every single person who committed a violent crime within the last year was an illicit substance abuser (which is a quantum leap of an

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assumption), the violent persons targeted by § 922(g)(3) would still only account for 3.2% of the total people affected by § 922(g)(3).[15] This is like leveling the entire rainforest just to take down a single tree.

This law seeks to deprive an extraordinary number of people of their fundamental constitutional rights, without the remotest attempt at narrowly tailoring the scope of its impact. As evidenced by the statistical analysis provided above and further supported by the accompanying footnote, a basic examination of drug use and violent crime in this country shows that this law attacks the constitutional rights of more than thirty times the number of people that it is intended to affect. This law is flawed at its very core and must be declared unconstitutional.

4. Even Under an Intermediate Scrutiny Analysis, 18 U.S.C. § 922(g)(3) is Unconstitutional Because the Expansive Scope of the Law, Covering More than Half of the U.S. Population, is Not Substantially Related to Any Important Government Interest.

Even though the United States Supreme Court has made it clear in its opinions from *Heller* and *McDonald* that the Second Amendment is a "fundamental" individual right, some Circuit Courts have erroneously sought to apply an intermediate scrutiny standard in their examinations of the constitutionality of § 922(g)(3). *See U.S v. Seay*, 620 F.3d 919 (8th Cir 2010); *U.S. v Yancey*, 621 F.3d 681 (7th Cir 2010). While the fundamental nature of Second Amendment Rights calls for and requires a strict scrutiny analysis, even when properly analyzed under intermediate scrutiny, the law fails to pass constitutional muster.

To overcome intermediate scrutiny, the asserted governmental interest must be "substantial," rather than "compelling," and the regulation adopted must "be a direct, substantial relationship between the objective and the means chosen to accomplish the

[15] This statistic is based on a combination of two statistical sources. First, and as noted earlier, the Substance Abuse and Mental Health Services Administration calculates that 38,806,000 Americans had taken illicit drugs within the last twelve months. *Supra* at note 20. Second, statistics compiled by the Federal Bureau of Investigation estimate that in that same year there were approximately 1,240,000 instances of violent crime. *See* CRIME IN THE UNITED STATES, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violent-crime. Taken together, if we assume that each instance of violent crime was committed by a separate and distinct individual, and that each and every violent assailant was an illicit drug user, then only 3.2% of illicit drug users account for all violent crimes committed in the United States.

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objective." *Coral Const. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991); *See also Association of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729 (9th Cir. 1994) (*citing Central Hudson Gas v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980); *Consolidated Edison Co. v. Public Service Comm'n of N.Y.,* 447 U.S. 530, 540, 100 S.Ct. 2326, 2334-35, 65 L.Ed.2d 319 (1980). As noted by the Ninth Circuit, "[i]ntermediate scrutiny's precise contours vary slightly depending upon which constitutional right is at issue." *Jacobs v. Clark County School Dist.,* 526 F.3d 419, fn 23 (9th Cir. 2008). Neither the Ninth Circuit, nor the Supreme Court has set down a system of intermediate scrutiny as applied to Second Amendment issues.

Here, the Plaintiff does not argue or even question whether § 922(g)(3) is intended to further a "substantial" government interest. As previously noted, the underlying purpose of § 922(g)(3) is to keep firearms out of the hands of potentially dangerous people. This underlying goal is perfectly valid and addresses a genuine policy concern. However, due to the extraordinary breadth and scope of § 922(g)(3), the law fails to provide a direct, substantial relationship between the law's objective and the means chosen to accomplish that objective.

As noted earlier, § 922(g)(3) takes a scorched earth approach, seeking to deprive huge swaths of the American populace of their Second Amendment rights in an over zealous attempt to curtail gun ownership amongst a much smaller subset of individuals. The overwhelming impact of the law falls on the shoulders of non-violent, harmless individuals, depriving those individuals of a fundamental constitutional right to keep and bear arms. The law does not merely apply to thieving, violent scoundrels. As written, § 922(g)(3) prohibits the sick, the elderly[16], and millions others.

Meanwhile, the law allows a specific exception for alcohol abuse. Curiously, alcoholism, a condition that is widely known to increase aggression and violent tendencies[17] is exempted from prosecution under § 922(g)(3). If the law were truly constructed for the purpose of

[16] *See supra* note 8 (90.1% of persons over the age of 65 report having taken prescription medications within the last thirty days).

[17] *See* NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM NO. 38 OCTOBER 1997, available at http://pubs.niaaa.nih.gov/publications/aa38.htm

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curtailing the ownership of firearms amongst potentially violent people, then why would it provide a specific exclusion for alcoholics? In a 1997 report from the National Institute of Health, it was noted that, as a direct effect of the consumption of alcohol, "[a]lcohol may encourage aggression or violence by disrupting normal brain function."[18] Nevertheless, § 922(g)(3), a law allegedly designed to keep firearms out of the hands of potentially dangerous people makes no attempt to keep guns from alcoholics.

Meanwhile, there is no viable evidence to suggest that marijuana use is correlated with violent crime (or any other crime beyond illegal drug use). While the Government makes a feeble attempt to tie drug use to criminal behavior, the statistics that the Government points to fail to take into account the large number of non-criminal drug users. The statistics cited by the Government merely analyze the number of prison inmates who admit to having been on narcotic substances at the time of arrest. However, those individuals account for a miniscule fraction of the total number of drug users in the United States.

At the end of 2010, state and federal prison populations totaled 1,518,104. Correctional Population in the United States, 2011. Bureau of Justice Statistics. This figure equals approximately 0.5% of the U.S. population. *Id.*; 2010 Census. Federal prisons housed 206,968 prisoners while state prisons housed 1,311,136. The 2004 DOJ study relied upon by Defendants indicates that 32% of state prisoners and 26% of federal prisoners committed their current offense while under the influence of drugs.[19] However, only 15% of state prisoners and 14% of federal prisoners used marijuana at the time of their offense.[20] Thus, approximately 196,670 state inmates and 28,975 federal inmates committed their crimes while using marijuana. This equates to approximately 0.07% of the U.S. population having committed a crime while under the influence of marijuana. When this number is compared with the total number of Americans who report using marijuana, it is clear that marijuana use has no causal link to crime. Approximately 106,232,000 Americans (or 34.4% of the total U.S. population) report having

[18] *Id.*
[19] *See* http://bjs.ojp.usdoj.gov/content/dcf/duc.cfm.
[20] *Id.*

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using marijuana in their lifetime.[21] Approximately 17,373,000 Americans (or 5.6% of the total U.S. population) report having used marijuana in the past month. Thus, the number of incarcerated persons who were using marijuana at the time of their crime equals only 0.2% of all persons who have used marijuana and 1.2% of all persons who are habitual users of marijuana.

Additionally, the 2004 DOJ study reports that violent offenders were less likely than other offenders to have used drugs in the month prior to their offense.[22] The report states "Violent offenders in State prison (50%) were less likely than drug (72%) and property (64%) offenders to have used drugs in the month prior to their offense." *Id* at p. 1.

The Defendants also rely on a 2010 report by the Office of National Drug Control Policy. However, this report is not a good indicator of any supposed link between marijuana and crime because it only reports incidents of marijuana use in males arrested in 10 cities. Additionally, the ONDCP is not an independent research organization but rather a cabinet level component of the Executive Office with the stated objective of eradicating drug use. As such, any studies conducted by the ONDCP are inherently biased.

There is no viable link between the use of cannabis and violent behavior; meanwhile, there is clear and well-established evidence that alcohol is directly linked with violent behavior. Nevertheless, 18 USC § 922(g)(3) arbitrarily precludes users of cannabis (or any other controlled substance for that matter) from exercising their fundamental constitutional rights. Section 922(g)(3) does not provide a direct, substantial relationship between the law's objective and the means chosen to accomplish the objective. As such, the law must be declared unconstitutional.

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[21] *See* http://www.samhsa.gov/data/NSDUH/2k10ResultsTables/Web/HTML/Sect1peTabs1to46.htm#Tab1.1A.

[22] *See* http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf.

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C. 18 U.S.C. § 922(d)(3) is Similarly Unconstitutional Under Both a Strict Scrutiny or Intermediate Scrutiny Analysis.

18 USC § 922(d)(3), drafted as a counterpart to 18 USC § 922(g)(3), is similarly unconstitutional under both a strict and intermediate scrutiny analysis, since § 922(d)(3) is neither narrowly tailed to effect a compelling government interest, nor directly related to a substantial government interest.

18 USC § 922(d)(3) reads as follows:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—
> […]
> (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))

Much of the analysis devoted to § 922(g)(3) can be equally applied to § 922(d)(3), since the provisions virtually mirror each other. However, there is another distinct consideration with § 922(d)(3) – the law places an exceptional burden and liability upon firearms sellers. Unlike a ban on the sale of firearms to felons, this ban is generally difficult, if not impossible to police. A simple background check will typically reveal whether a person is a convicted felon. However, the standard imposed by § 922(d)(3), if effectively policed, would require gun sellers to conduct an extensive investigation of the private behaviors and habits of their customers (an investigation that might itself violate the privacy protections of the Constitution).

Meanwhile, the law raises a multitude of nearly unanswerable questions: To what extent is the seller required to investigate the drug habits of the buyer? If the seller knows that the buyer once took an illicit substance, is that a complete bar to any sale of a firearm? What if the instance of substance abuse was a year ago? What if it was six months ago? How long ago must the drug use be in order to allow the sale of a firearm? What if the buyer only smoked marijuana once at a party? What if the party was last week? What if the buyer is a recovered drug addict, who has relapsed numerous times? What if the last relapse was a year ago? What if the last relapse was ten years ago? Where do we draw the line?

This law is untenable, unenforceable, unconstitutional and utterly unrealistic.

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RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

IV. PLAINTIFF'S PRIMARY PURPOSE IN THIS ACTION IS TO PROCURE DECLARATORY AND INJUNCTIVE RELIEF RATHER THAN MONETARY DAMAGES.

As noted above, Plaintiff has voluntarily dismissed her claims against the Defendants in their individual capacities. Plaintiff does not dispute that 5 U.S.C § 702 does not provide for monetary damages against the United States, the ATF or the individual Defendants in their official capacities. The primary purpose of Plaintiff's Complaint is, and has always been, to obtain declaratory and injunctive relief against the Defendants. To the extent that the Prayer for Relief contained in Plaintiff's Complaint seeks monetary damages, Plaintiff agrees that 5 U.S.C § 702 does not provide for such damages. Further, based upon the Plaintiff's prior dismissal of the Defendants in their individual capacities, the Plaintiff does not object to the dismissal of her conspiracy claim. Notwithstanding the foregoing, Plaintiff does not waive her right to pursue various fees and costs associated with pursuing this case as provided for in 28 U.S.C. § 2412 and similar statutes.

CONCLUSION

As set forth above, there are no disputed material facts in this matter. Based upon the authorities set forth herein, Plaintiff is entitled to summary judgment on her claims for violations of the Second and Fifth Amendment against the Defendants. Plaintiff respectfully requests that Defendants' Motion be DENIED as to the Plaintiff's Second and Fifth Amendment claims and that summary judgment be GRANTED in Plaintiff's favor as to these claims.

Dated this 9th day of March 2012.

Respectfully Submitted by:

RAINEY DEVINE, ATTORNEYS AT LAW

By: /s/ Chaz Rainey

Charles C. Rainey, Esq.
Nevada Bar No. 10723
2445 W. Horizon Ridge Pkwy, Ste. 110
Henderson, Nevada 89052
Telephone: +1.702.425.5100
Facsimile: +1.888.867.5734
Attorney for Plaintiff

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

PROOF OF SERVICE

I, Jennifer J. Hurley, an employee of The Law Firm of Rainey Devine, certify that the following individuals were served with PLAINTIFF'S RESPONSE TO THE UNITED STATES' MOTION TO DISMISS OR, IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, on this date by the below identified method of service:

Electronic Case Filing

TONY WEST
DANIEL G. BOGDEN
SANDRA SCHRAIBMAN
ALICIA N. ELLINGTON
JOHN K. THEIS
Trial Attorneys, Federal Programs Branch
United States Department of Justice, Civil Division
20 Massachusetts Ave, N.W. Rm 7226
Washington, DC 20530

Zachary Richter
Trial Attorney, Constitutional Torts Staff
United States Department of Justice, Civil Division
P.O. Box 7146, Ben Franklin Station
Washington, DC 20044

DATED this 9th day of March 2012.

/s/Jennifer J. Hurley
An employee of The Law Firm of Rainey Devine.

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

STUART F. DELERY
Acting Assistant Attorney General

DANIEL G. BOGDEN
United States Attorney

SANDRA M. SCHRAIBMAN
Assistant Director, Federal Programs Branch

JOHN K. THEIS
Trial Attorney, Federal Programs Branch
United States Department of Justice, Civil Division
20 Massachusetts Ave., N.W., Rm. 6701
Washington, D.C. 20530
Telephone: (202) 305-7632
Facsimile: (202) 616-8460
John.K.Theis@usdoj.gov

Attorneys for Defendants the United States of America, ATF, U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert, in their official capacities (collectively, the United States)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

S. ROWAN WILSON, Plaintiff, v. ERIC HOLDER, Attorney General of the United States et al., Defendants.	Case No.: 2:11-CV-1679-GMN-(PAL)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

(HEARING REQUESTED)

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INTRODUCTION

As explained in Defendants' opening brief, Plaintiff's constitutional challenges to 18 U.S.C. §§ 922(d)(3) and (g)(3), 27 C.F.R. § 478.11, and the September 2011 Letter issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") have no merit. The Ninth Circuit's decision in United States v. Dugan squarely forecloses Plaintiff's Second Amendment claim. Even if the Court were to engage in the independent Second Amendment analysis that Plaintiff seeks, Plaintiff's claim would fail, as unlawful drug users are not within the class of law-abiding, responsible citizens historically protected by the Second Amendment, and § 922(g)(3) survives any level of scrutiny. In addition, § 922(d)(3) does not violate Plaintiff's Second Amendment rights, as there is no recognized constitutional right to sell firearms. Plaintiff's equal protection claim fails to allege a proper classification of a group against whom Defendants have discriminated. Plaintiff's responsive brief does nothing to diminish these arguments. Furthermore, Plaintiff's procedural and substantive due process claims—raised for the first time in her response—must fail, as Plaintiff cannot amend her Complaint by adding new claims in her opposition brief. Even if the Court were to address these "claims," there is no substantive due process right to use marijuana for medical purposes, and Defendants have not deprived Plaintiff of a constitutionally-protected liberty or property interest. Accordingly, this Court should dismiss this action (or enter judgment for Defendants) and deny Plaintiff's cross-motion for summary judgment.[1]

[1] Plaintiff voluntarily dismissed her claims against the named defendants in their individual capacities. See Stipulation of Dismissal of Individual Defendants (Dkt. 14). The remaining defendants are the United States, ATF, and U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert in their official capacities.

I. DEFENDANTS HAVE MOVED TO DISMISS UNDER RULE 12(b)(6), OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.

Plaintiff misconstrues the posture of Defendants' motion. Defendants moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6),[2] which requires dismissal if the Complaint fails to state a claim upon which relief can be granted. See Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). As argued in Section I.A.1 of Defendants' Motion, Plaintiff's Second Amendment claim should be dismissed under United States v. Dugan because it fails to state a claim, even assuming the facts alleged in the Complaint are true. The Court need not reach any other arguments to dismiss the Second Amendment claim. However, in Sections I.A.2 and I.A.3 of the Motion, Defendants argued that the Second Amendment claim should be dismissed because unlawful drug users fall outside the scope of the Second Amendment as understood at the adoption of the Bill of Rights, and that § 922(g)(3) survives intermediate scrutiny. See Memorandum in Support of the United States's Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Def. Mot.") at 15-27 (Dkt. 10). In the course of that argument, Defendants presented some extrinsic sources that the Court may consider, such as a government report on the association between cognitive functioning and marijuana use. If the Court determines that it can only dismiss the Complaint by relying on those extrinsic sources, then the Court should treat Defendants' motion as a Motion for Summary Judgment under Rule 56. To facilitate that, Defendants attached to their motion a Statement of Undisputed Facts in compliance with Local Rule 56-1.

Rather than responding to Defendants' Rule 56 Statement, Plaintiff baldly asserts that Defendants failed to dispute the factual allegations in the Complaint, and then submits her own Rule 56 statement (Dkt. 17-1). This Statement should be rejected. The majority of the asserted

[2] Defendants also moved to dismiss the common law conspiracy claim for lack of subject matter jurisdiction under Rule 12(b)(1). Plaintiff has agreed to dismiss the conspiracy claim in its entirety. See Plaintiff's Response to the United States' Motion to Dismiss or, in the Alternative for Summary Judgment, and Plaintiff's Cross-Motion for Summary Judgment ("Pl's Op."), at 2, 25 (Dkt. 17).

"facts" in the Statement fail to comply with Local Rule 56-1's requirement that each material fact contain a citation to the "particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies." See Dkt. 17-1, ¶¶ 1-28. The Statement also contains multiple conclusions of law, which do not qualify as "facts." See, e.g., id. at ¶ 29 ("No evidence exists that Ms. Wilson has ever been an 'an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance' and Plaintiff maintains that she is not an unlawful user of or addicted to marijuana or any other controlled substance."); see also ¶¶ 2, 16, 42. In any event, Plaintiff's Statement essentially restates the allegations in her Complaint. To be clear, the facts alleged in Plaintiff's Complaint are accepted as true for purposes of the Motion to Dismiss only. See Def. Mot. at 10 n.7. Defendants dispute many facts in the Complaint, but those disputes are immaterial to the arguments being raised before the Court in Defendants' Motion.

II. PLAINTIFF HAS NOT ESTABLISHED A SECOND AMENDMENT VIOLATION

A. United States v. Dugan, Which Is Controlling, Requires Dismissal of Plaintiff's Second Amendment Claim.

Plaintiff's Second Amendment claim is foreclosed by United States v. Dugan, 657 F.3d 998 (9th Cir. 2011). There, the Ninth Circuit upheld § 922(g)(3) against a Second Amendment challenge, holding that "[b]ecause Congress may constitutionally deprive felons and mentally ill people of the right to possess and carry weapons, . . . Congress may also prohibit illegal drug users from possessing firearms." Id. at 999-1000. Dugan, who was licensed to grow and use medical marijuana, argued that many marijuana users, including those in compliance with state medical marijuana laws, do not "engag[e] in any behavior that would provide a legitimate basis for excluding them from the reach of the Second Amendment." See Brief for Appellant at 59, United States v. Dugan, 657 F.3d 998 (2011) (No. 08-10579), ECF No. 57. In rejecting Dugan's challenge, the court of appeals did not distinguish between Dugan's status as a medical marijuana cardholder and any other user of marijuana. Dugan's holding—that the prohibition on

illegal drug users from possessing firearms does not violate the Second Amendment—applies equally to all unlawful users of marijuana. See United States v. Stacy, No. 09-cr-3695, 2010 WL 4117276, at *7 (S.D. Cal. Oct. 18, 2010) (noting, in the course of rejecting a Second Amendment challenge to § 922(g)(3), that "[t]he fact that this particular case involves the alleged lawful use of marijuana under state law does not have any bearing on the presumptively lawful nature of the restriction"). Accordingly, under Dugan, Plaintiff's Second Amendment challenge to § 922(g)(3) must fail.

In response, Plaintiff argues that Dugan "is a deeply flawed opinion that must be overturned." Pl's Op. at 16. Of course, Dugan is binding authority on this Court, and this Court is not empowered to overrule the Ninth Circuit's decision. See, e.g., Citizens for Better Forestry v. USDA, 567 F.3d 1128, 1134 (9th Cir. 2009) (court of appeals precedent is binding on district court). Plaintiff's grounds for overturning Dugan—the alleged brevity of the court's analysis and an allegation that the "facts of Dugan are so prejudicial that they fail to provide a proper framework for analyzing the constitutionality of § 922(g)(3)" (Pl's Op. at 16-17)—even if true, are not proper grounds for ignoring Ninth Circuit precedent.

B. Unlawful Drug Users, Including Those Who Comply with State Medical Marijuana Laws, Fall Outside the Scope of the Second Amendment.

Because Dugan resolves Plaintiff's Second Amendment claim, the Court need not undergo an "independent" constitutional analysis of § 922(g)(3). See Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 778 (2005) (longstanding doctrine of constitutional avoidance cautions courts to avoid making unnecessary constitutional determinations). Nonetheless, were the Court to engage in such an analysis, Plaintiff's claim would still fail. As set forth in Defendants' Motion (Def. Mot. at 15-27), several courts have established a two-step approach to Second Amendment challenges to federal statutes and regulations. See, e.g., Heller v. District of Columbia, --- F.3d ----, 2011 WL 4551558, at *5 (D.C. Cir. Oct. 4, 2011) ("Heller II"); Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011); United States v. Chester, 628 F.3d 673,

680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010). Under this approach, "[w]e ask first whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny." Heller II, 2011 WL 4551558 at *5. Plaintiff's claim fails both parts of the analysis, as unlawful drug users are not within the class of law-abiding, responsible citizens historically protected by the Second Amendment, and § 922(g)(3) survives the appropriate level of scrutiny.[3]

In the opening brief, Defendants demonstrated that unlawful drug users fall outside the scope of the Second Amendment as understood at the adoption of the Bill of Rights. Def. Mot. at 15-20. Heller recognized the "core" Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home." District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008) (emphasis added). This articulation acknowledges that the Anglo-American

[3] Plaintiff appears to frame her Second Amendment argument as an overbreadth challenge. See Pl's Op. at 16 ("[Plaintiff's Second Amendment analysis will] demonstrate that the expansive scope of 18 U.S.C. § 922(g)(3) renders it unenforceable and unconstitutional."); see also id. at 14 ("18 USC § 922(g)(3) is an exceptionally over-broad statute . . ."); id. ("The extraordinary breadth of this law renders it unenforceable and wholly unconstitutional."). This is not a proper Second Amendment challenge. The overbreadth doctrine permits courts to relax the usual rules of standing in the First Amendment context and in a few other settings. Sabri v. United States, 541 U.S. 600, 609-10 (2004); see also United States v. Salerno, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."). Plaintiff has identified no basis on which that doctrine could be applied here. See United States v. Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011) (rejecting a Second Amendment overbreadth challenge); United States v. Weaver, No. 2:09–cr–00222, 2012 WL 727488, at *9-10 (S.D. W. Va. March 6, 2012) (finding no authority to extend the overbreadth doctrine to the Second Amendment). This is because in the Second Amendment context, "[a] person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present." United States v. Skoien, 614 F.3d 638, 645 (7th Cir. 2010) (en banc) (citing Salerno, 481 U.S. at 745). Because Plaintiff cannot bring a constitutional challenge that asserts the rights of others, any argument based on the alleged "overbreadth" of § 922(g)(3) must be rejected.

right to arms incorporated into the Second Amendment excluded certain categories of individuals, including non-law-abiding citizens. Def. Mot. at 15-19. Therefore, violators of the Controlled Substances Act fall outside of the Second Amendment's scope. Plaintiff apparently does not dispute this point. She does not offer any historical analysis of the Second Amendment and effectively concedes that violators of the law are disqualified from exercising their Second Amendment rights.

1. Federal Law Does Not Recognize "Law-Abiding" Users of Marijuana, and § 922(g)(3) Plainly Prohibits Use of Marijuana for "Medical Purposes."

Plaintiff instead contends that users of medical marijuana are not "unlawful users" of a controlled substance. Pl's Op. at 10-14. According to Plaintiff, "Congress did not intend for law-abiding medical cannabis patients to be included in the definition of 'unlawful user.'" Id. at 10. The underlying assumption of Plaintiff's argument—indeed, the apparent central contention of her entire case—is that users of medical marijuana do not violate federal law. But there are no "law-abiding medical cannabis patients" under federal law. See Gonzales v. Raich, 545 U.S. 1, 27 (2005) (explaining that even if marijuana is used "for personal medical purposes on the advice of a physician," it is still considered contraband under the CSA, which designates marijuana as contraband "for any purpose") (emphasis in original); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) ("Whereas some other drugs can be dispensed and prescribed for medical use, . . . the same is not true for marijuana."); United States v. Katz, No. 09-50619, 2010 WL 183863, at * 1 (9th Cir. Jan. 19, 2010) (vacating pretrial detention order, which modified defendant's bond order to permit defendant to use and possess marijuana for medical purposes in compliance with California law, because it is illegal to possess marijuana under federal law); United States v. Scarmazzo, 554 F. Supp. 2d 1102, 1105 (E.D. Cal. 2008) ("The use of medical marijuana remains unlawful [under federal law].").[4]

[4] Plaintiff's attempts to distinguish Raich and Oakland Cannabis fall flat. Pl's Op. at 12. Raich did indeed rule on whether Congress could, under the Commerce Clause, criminalize the

(*Footnote continued on following page.*)

Notwithstanding this well-settled law, Plaintiff contends that the legislative history of § 922(g)(3) reflects an intent to exclude medical marijuana users from the statute's reach. But the plain language of the statute is clear on its face, which means that this Court need not delve into § 922(g)(3)'s legislative history and policies, although they may still be instructive. See Suzlon Energy Ltd. v. Microsoft Corp., --- F.3d ----, No. 10-35793, 2011 WL 4537843, at *1 (9th Cir. Oct. 3, 2011) (citing Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) (finding it "unnecessary to rely on the legislative history" when the plain language of the statute was clear, but finding it an "instructive" way to "lend support" to its holding)); Am. Rivers v. FERC, 201 F.3d 1186, 1204 (9th Cir. 1999) ("[W]e are mindful that this Court steadfastly abides by the principle that 'legislative history—no matter how clear—can't override statutory text.'") (quoting Hearn v. W. Conference of Teamsters Pension Trust Fund, 68 F.3d 301, 304 (9th Cir. 1995)).[5] Section 922(g)(3) references an "unlawful user of . . . any controlled substance" as

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manufacture, distribution, or possession of marijuana by intrastate growers and users of marijuana for medical purposes. But in so doing, the court observed that "[b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." 545 U.S. at 14 (citing the CSA and Oakland Cannabis, 532 U.S. at 490). As for Oakland Cannabis, Plaintiff's reference to the reversed Ninth Circuit opinion, 190 F.3d 1109 (1999), and Justice Stevens's concurrence notwithstanding, the majority expressly held that marijuana cannot be prescribed for medical use under federal law. 532 U.S. at 491. Nor can Plaintiff rely on the Supreme Court's denial of certiorari from Willis v. Winters, 253 P.3d 1058 (Or. 2011). Pl's Op. at 13 ("The Supreme Court's decision not to review this decision indicates that the Oregon court's decision and reasoning should stand."). A denial of certiorari has no precedential effect, see Hopfmann v. Connolly, 471 U.S. 459, 461 (1985), and the holding of the Court—that § 922(g)(3) does not preempt a state concealed handgun licensing statute—has no bearing on this case.

[5] Regardless, Plaintiff draws untenable conclusions from the legislative history. Plaintiff suggests that by removing the direct reference to "marijuana" in 1986, Congress somehow sanctioned its use. As noted in Defendants' Motion (Def. Mot. at 23, n.12), Congress passed the amendment in 1986 to close a loophole and to expand the category of those prohibited. See H.R. Rep. No. 99-495, at 23 (1986) ("Current law does not include hallucinogenic drugs that were controlled by the Controlled Substances Act, including the violence-inducing drug phencyclidine

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defined by the Controlled Substances Act (CSA) (21 U.S.C. § 802). Under the terms of the CSA, marijuana "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for use of [marijuana] under medical supervision." 21 U.S.C. § 812(b)(1). Under a plain reading of the text, if an individual uses marijuana in violation of the CSA, he would qualify as an "unlawful user" under § 922(g)(3). See Stacy, 2010 WL 4117276, at *6 ("Because § 922(g)(3) is a *federal* statute that refers to being an unlawful user of any controlled substance as defined by the *federal* Controlled Substances Act, the Court concludes that an ordinary person would understand that if he used marijuana in violation of federal law, he would qualify as an 'unlawful user' within the meaning of § 922(g)(3), regardless of whether he could be prosecuted under state law." (emphasis in original)).[6]

2. The Ogden Memo Does Not Estop the Government from Treating Medical Marijuana Users as Violators of Federal Law.

In her opposition, Plaintiff erroneously attempts to invoke the equitable doctrine of judicial estoppel to contend that Defendants are estopped from arguing that persons complying with state medical marijuana laws are "unlawful users" of a controlled substance. Pl's Op. at 12-

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(PCP), various tranquilizers, designer drugs and other substances that have been added to the schedules of controlled substances.").

[6] To the extent that Plaintiff may be challenging ATF's interpretation of the term "unlawful user," this interpretation should be entitled to deference. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); Wash., Dep't of Ecology v. U.S. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (finding that an agency's reasonable interpretation of a statute is entitled to deference "even if [the court] would have reached a different result had [it] construed the statute initially"). This principle applies with particular force where, as here, "statutory construction involves reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation (depends) upon more than ordinary knowledge respecting the matters subjected to agency regulations." S.F. Baykeeper v. Cargill Salt Div., 481 F.3d 700, 705 (9th Cir. 2007) (quoting Wash., Dep't of Ecology, 752 F.2d at 1469)).

13. In doing so, Plaintiff appears to rely on the Joint Stipulation of Dismissal Without Prejudice, filed in January 2010 by the parties to another case, County of Santa Cruz et al. v. Holder et al., No. 03-1802 (N.D. Cal.), to suggest that the "Federal Government has conceded that persons complying with state medical marijuana laws are not 'unlawful users.'" Pl's Op. at 12.

The government has made no such concession. The stipulation in Santa Cruz incorporates a guidance memorandum issued by then-Deputy Attorney General David Ogden to U. S. Attorneys (the "Ogden Memo"), indicating that, in order to make "efficient and rational use of [the Department's] limited investigative and prosecutorial resources," federal prosecutors "should not," as a general matter, "focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"—such as "individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law," or their caregivers who, consistent with state law, provide them with marijuana for medicinal purposes. See Ogden Mem. (attached hereto as Exhibit A), at 1-2. However, the memorandum further states that "[t]he prosecution of significant traffickers of illegal drugs, including marijuana . . . continues to be a core priority" of the Department. Id. at 1 (emphasis added). By its express terms, the memorandum "d[id] not alter in any way the Department's authority to enforce federal law," "d[id] not 'legalize' marijuana or provide a legal defense to a violation of federal law," and did not "create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter." Id. at 2. Instead, the memorandum made clear that it was "intended solely as a guide to the exercise of investigative and prosecutorial discretion." Id.

Contrary to Plaintiff's assertions, the doctrine of judicial estoppel has no application in this case.[7] Judicial estoppel only applies if "a party's later position [is] 'clearly inconsistent'

[7] It is unlikely that the doctrine of estoppel would apply to Defendants, given the policy questions presented here. See Heckler v. Cmty. Health Servs., Inc., 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other

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with its earlier position." New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001). As courts have repeatedly recognized, nothing in the Ogden Memo made marijuana possession legal or prevented the federal government from enforcing the CSA as it sees fit. See Sacramento Nonprofit Collective v. Holder, No. 2:11-cv-02939, 2012 WL 662460, at *9 (E.D. Cal. Feb. 28, 2012) ("A reasonable person, having read the entirety of the Ogden Memo, could not conclude that the federal government was somehow authorizing the production and consumption of marijuana for medical purposes. Any suggestion to the contrary defies the plain language of the Memo.") (quoting Montana Caregivers Ass'n, LLC v. United States, --- F.Supp.2d ----, No. CV 11-74-M-DWM, 2012 WL 169771, at *1-2 (D. Mont. Jan. 20, 2012)); see also United States v. Stacy, 734 F. Supp. 2d 1074, 1080-81 (S.D. Cal. 2010) (recognizing that the memo "provid[es] 'guidance regarding resource allocation' and 'does not 'legalize' marijuana or provide a legal defense to a violation of federal law'") (quoting Ogden Memo). Therefore, because the federal government has never taken an inconsistent position on this issue, Plaintiff's estoppel argument should be rejected. See Marin Alliance for Medical Marijuana v. Holder, --- F. Supp. 2d ---, No. C 11-05349-SBA, 2011 WL 5914031, at *8-9 (N.D. Cal. Nov. 28, 2011); Sacramento Nonprofit, 2012 WL 662460, at *8-9.[8]

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litigant."); New Hampshire v. Maine, 532 U.S. 742, 755 (2001) ("[B]road interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests.") (citation and internal quotation marks omitted).

[8] Plaintiff can also not avail herself of the burden of proof for a criminal prosecution under § 922(g)(3) to argue that marijuana registry cardholders are not "unlawful users" of a controlled substance. See Pl's Op. at 12-13 (citing United States v. Purdy, 264 F.3d 809 (9th Cir. 2001)). That burden is not relevant to Plaintiff's constitutional challenge.

C. Under an Independent Constitutional Analysis, Section 922(g)(3) Survives the Appropriate Level of Scrutiny.

1. No More than Intermediate Scrutiny Should Apply.

As set forth in Defendants' opening brief (Def. Mot. at 20-27), though the Ninth Circuit has not directly addressed the question of the appropriate level of scrutiny applicable to Second Amendment claims, other courts of appeals to reach this issue have uniformly applied intermediate scrutiny. See United States v. Carter, 669 F.3d 411, 416 (4th Cir. 2012) (applying intermediate scrutiny in evaluating challenge to § 922(g)(3)); United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) (same); see also Marzzarella, 614 F.3d at 96-97 (applying intermediate scrutiny to challenge to § 922(k)); United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to challenge to § 922(g)(8)); Heller II, 2011 WL 4551558, at *9 (applying intermediate scrutiny to review novel gun registration laws). The weight of this authority confirms that, if Plaintiff's Second Amendment claim is to be reviewed independently by the Court, no more than intermediate scrutiny should apply.

Plaintiff contends that strict scrutiny should apply because the right protected by the Second Amendment has been held to be a fundamental right. Pl's Op. at 17-18. "The [Supreme] Court has not said, however, and it does not logically follow, that strict scrutiny is called for whenever a fundamental right is at stake." Heller II, 2011 WL 4551558, at *8 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Marzzarella, 614 F.3d at 96; United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010); and Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 697-98, 700 (2007)). Therefore, that the Second Amendment protects rights that are "fundamental," McDonald v. City of Chicago, 130 S. Ct. 3020, 3036-42 (2010), does not mandate application of strict scrutiny to Plaintiff's claim. See Peruta v. County of San Diego, 758 F. Supp. 2d 1106, 1115-16 (S.D. Cal. 2010) (applying intermediate scrutiny to a Second Amendment challenge, as "fundamental constitutional rights are not invariably subject to strict scrutiny").

Applying intermediate scrutiny is especially appropriate in the present case. Plaintiff, as an unlawful user of a controlled substance, does not fall into the category of "law-abiding, responsible citizens" whose rights are at the core of the Second Amendment. See Carter, 669 F.3d at 416 (rejecting the application of strict scrutiny to § 922(g)(3), as "[an unlawful drug user] cannot claim to be a law-abiding citizen, and therefore his asserted Second Amendment claim cannot be a core right"); Ezell, 651 F.3d at 703 (level of scrutiny "will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right"). In addition, because Plaintiff can avoid the restriction of § 922(g)(3) by simply relinquishing her marijuana registry card and refraining from using marijuana, the severity of the restriction is not particularly substantial. See Heller II, 2011 WL 4551558, at *9 ("[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify."); Yancey, 621 F.3d at 687-688 ("[A]s § 922(g)(3) prohibits only current drug users from possessing firearms, it is far less restrictive than [the 1968 Act's] provision affecting felons and the mentally ill.") (emphasis in original).

2. Section 922(g)(3) Substantially Relates to the Important Government Interest in Protecting Public Safety and Combating Violent Crime.

Under intermediate scrutiny, "a regulation must be substantially related to an important governmental objective." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir. 2009). Applying intermediate scrutiny, the law restricting the possession of firearms by unlawful drug users relates substantially to the important government objective of reducing violent crime and protecting public safety. See Def. Mot. at 20-27.

Plaintiff concedes that § 922(g)(3) is intended to further a "substantial government interest" in "keep[ing] firearms out of the hands of potentially dangerous people." Pl's Op. at 21. Indeed, the Supreme Court has characterized the relevant interest as "compelling." Salerno, 481 U.S. at 750; Schall v. Martin, 467 U.S. 253, 264 (1984). However, Plaintiff contends that

the law fails to provide a direct, substantial relationship between the objective and the chosen means. Plaintiff is incorrect. In the Defendants' opening brief (Def. Mot. at 22-27), Defendants presented a wide range of sources supporting the conclusion that a substantial relationship exists between § 922(g)(3) as applied to drug users and Congress's goal of protecting public safety and combating violent crime, including the legislative history of § 922(g)(3), similar state restrictions, and academic and empirical studies. In addition, the limited temporal scope of the statute—tailoring the restriction to current unlawful users—ensures that the statute bears a reasonable fit to the end it serves. See Carter, 669 F.3d at 419; Yancey, 621 F.3d at 687 ("[T]he Second Amendment . . . does not require Congress to allow [an unlawful user] to simultaneously choose both gun possession and drug abuse."). In response, Plaintiff makes three primary arguments as to why § 922(g)(3) is not substantially related to the government interest in protecting public safety, each of which is baseless.

First, Plaintiff contends that § 922(g)(3) bears no substantial relationship to its end because of the statute's "extraordinary breadth and scope." Pl's Op. at 21-22. According to Plaintiff, "[t]he overwhelming impact of the law falls on the shoulders of non-violent, harmless individuals." Id. at 21. However, the fact that certain individuals who may theoretically pose a lesser threat to public safety fall within the ambit of § 922(g)(3) does not render the statute unconstitutional. This is implicit in Heller's recognition of the validity of categorical limitations on the Second Amendment's scope. 554 U.S. at 626-27, n.26; see also Skoien, 614 F.3d at 641; Tooley, 717 F. Supp. 2d at 597. Moreover, "intermediate scrutiny, by definition, permits legislative bodies to paint with a broader brush than strict scrutiny. . . . As a consequence, the degree of fit between [§ 922(g)(3)] and the well-established goal of promoting public safety need not be perfect; it must only be substantial." Heller II, 698 F. Supp. 2d at 191 (citations and internal punctuation omitted). Plaintiff nevertheless argues that "huge swaths of the American populace" are deprived of their Second Amendment rights by § 922(g)(3) and the ATF regulation, because, according to Plaintiff, the restriction applies to all individuals who have

reported using marijuana at some point in their lifetime and individuals who use prescription drugs. Pl's Op. at 21. Plaintiff misreads the statute. The vast majority of these individuals are not restricted by § 922(g)(3). Congress tailored § 922(g)(3) by focusing on only "current" users of controlled substances, not individuals who have admitted to using marijuana at some point in their past. As for prescription drugs, 27 C.F.R. § 478.11 defines "unlawful user of or addicted to any controlled substance" as the use of a controlled substance "in a manner other than as prescribed by a licensed physician."[9] Lawful prescription drug users are therefore not "unlawful users" of controlled substances.

Second, Plaintiff mistakenly contends that the fact that § 922(g)(3) does not prohibit users or abusers of alcohol from possessing firearms renders the statute unconstitutional. This underinclusivity argument has been expressly rejected by at least one court of appeals. See Carter, 669 F.3d at 421 ("Carter faults § 922(g)(3) for its under-inclusiveness by targeting irresponsible users of some mind altering substances, such as marijuana, but not users of other substances, such as alcohol. But this argument simply amounts to a disagreement with Congress' policy decision to link the firearms prohibition in § 922(g)(3) to the Controlled Substances Act, 21 U.S.C. § 802."). Additionally, the underinclusivity doctrine applies primarily in the First Amendment context, and Plaintiff cites no authority for the proposition that the doctrine should apply to her claim. Because it is used in strict scrutiny analysis, the First Amendment underinclusivity doctrine is a poor fit to the Second Amendment issue here. See United States v. Virginia, 518 U.S. 515, 573 (1996) (Scalia, J., dissenting) ("Intermediate scrutiny has never required a least-restrictive-means analysis, but only a 'substantial relation' between the classification and the state interests that it serves."). Furthermore, because the doctrine's purpose is to prevent "governmental attempt[s] to give one side of a debatable public question an advantage in expressing its views to the people" or government attempts to "select

[9] As noted, marijuana, a Schedule I drug, cannot be legally prescribed for medical use. See 21 U.S.C. § 829; Oakland Cannabis, 532 U.S. at 491.

the permissible subjects for public debate and thereby to control the search for political truth," City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (internal citations and punctuation omitted), it is difficult to apply outside the First Amendment context, where content-based regulations of expression receive the most exacting scrutiny.[10]

Third, Plaintiff attempts to cast doubt on Congress's determination that marijuana use is linked to crime. Pl's Op. at 22-23 ("There is no viable link between the use of cannabis and violent behavior."). Plaintiff's argument is policy-based, and is intended to support her opinion that the majority of marijuana users are "non-violent, harmless individuals." Id. at 21. Plaintiff's contentions would be better addressed to a legislative body, as "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." Ferguson v. Skrupa, 372 U.S. 726, 729 (1963); see also Turner Broad. Sys. v. FCC, 512 U.S. 622, 665-66 (1994) (noting that "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" complex and dynamic issues). In any event, there are sound reasons why Plaintiff's policy arguments are not persuasive here. See Def. Mot. at 23-25.

In sum, § 922(g)(3) does not violate the Second Amendment, as it is substantially related to the compelling government interest of reducing violent crime and protecting public safety.

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[10] Moreover, in analyzing the constitutional propriety of the limitations of a statute, courts are "guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Buckley v. Valeo, 424 U.S. 1, 105 (1976) (internal citations and punctuation omitted); see also United States v. Lewitzke, 176 F.3d 1022, 1027 (7th Cir. 1999) (Congress did not act irrationally in imposing firearms disability solely upon persons convicted of domestic violence misdemeanors, despite the fact that "persons convicted of other sorts of misdemeanors [may] pose a danger to society if armed," because "Congress is free to take 'one step at a time'"); Olympic Arms v. Buckles, 301 F.3d 384, 390 (6th Cir. 2002) (rejecting argument that import ban of certain semi-automatic weapons was irrational because it prohibited firearms with more than one of four enumerated features, but allowed weapons with one of the features, because "Congress may work incrementally in protecting public safety" and its "decision first to target weapons commonly used for criminal activity or, likewise, those most heavily loaded with dangerous features is within their legislative authority").

III. SECTION 922(d)(3), AS APPLIED TO PLAINTIFF, DOES NOT VIOLATE THE SECOND AMENDMENT.

Plaintiff's challenge to § 922(d)(3)'s restriction on the sale of firearms is similarly meritless. Heller neither recognized a right to sell firearms nor called into question "laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27. In addition, for the same reasons that the Second Amendment does not preclude Congress from forbidding unlawful drug users from possessing firearms, Congress may also forbid that same group from acquiring firearms. See Def. Mot. at 27-28; United States v. Chafin, 423 F. App'x 342, 344 (4th Cir. Apr. 13, 2011) (unpublished).

Plaintiff's only argument in rebuttal is that § 922(d)(3) allegedly "places an exceptional burden and liability upon firearms sellers" and is therefore unenforceable. Pl's Op. at 24. But Plaintiff lacks standing to challenge the burden on federal firearms licensees ("FFLs"). Kyung Park v. Holder, 572 F.3d 619, 625 (9th Cir. 2009) ("As a general rule, a third party does not [have] standing to bring a claim asserting a violation of someone else's rights.") (citation omitted). Even if she did have standing, the alleged "burden" on FFLs is irrelevant here. The only relevant burden in this case would be a burden on a constitutional right, and as stated, there is no constitutional right to sell a firearm. See Def. Mot. at 27-28; Chafin, 423 F. App'x at 344.

IV. PLAINTIFF'S EQUAL PROTECTION CLAIM MUST FAIL.

Plaintiff has also failed to adequately articulate an equal protection claim because users of marijuana for medical purposes are not, as Plaintiff claims, "law-abiding citizens." Pl's Op. at 9; Compl. at ¶ 3-4. In order to state an equal protection claim, Plaintiff "must show that she is being treated differently from similarly situated individuals." Gonzalez-Medina v. Holder, 641 F.3d 333, 336 (9th Cir. 2011). Despite Plaintiff's repeated assertions that she is a "law-abiding citizen," federal law does not recognize a difference between medical marijuana users and other marijuana users. See Alternative Community Health Care Co-op., Inc. v. Holder, 2012 WL 707154, at *5 (S.D. Cal. March 5, 2012) (finding that users of marijuana for medicinal purposes

in violation of the Controlled Substances Act are not similarly situated to law-abiding citizens); see also *supra* at 7-9 and Def. Mot. at 5, 29-30. Because it is reasonable for the government to infer that individuals holding state-issued medical marijuana registry cards use marijuana, and because marijuana users violate federal law, Plaintiff fails to identify any similarly situated to citizens who do not violate federal law.[11]

Plaintiff also claims—for the first time in her opposition brief—that "registry cardholders are similarly situated to persons using medical marijuana in states where registry is not required." Pl's Op. at 9. Plaintiff argues that because some states allow medical marijuana use without issuing registry identification cards, some medical marijuana users will be able to buy guns more easily than people who live in states that require medical marijuana registry cards. Pl's Op. at 10. This argument fails to state a claim and should be dismissed as well.

As an initial matter, the facts underlying this argument were not set forth in the Complaint and therefore are not properly before this Court. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (noting that a court may not look beyond the complaint to plaintiff's briefs when determining the propriety of a motion to dismiss for failure to state a claim); Ruiz v. Laguna, No. 05-CV-1871, 2007 WL 1120350, at *26 (S.D. Cal. March 28, 2007) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.") (citation and internal quotation marks omitted). In particular, Plaintiff provides no citation or support for the bare assertion in her Opposition that "[s]everal states, such as California, have provided for the legal use of medical marijuana without the necessity of registering with the state or obtaining a state-issued registry identification card." Pl's Op. at 9.

[11] Plaintiff also erroneously argues that she is similarly situated to "users of the FDA-approved drug Marinol, which contains the same active ingredient as marijuana." Pl's Op. at 9. But Marinol is not a Schedule I controlled substance under the CSA, and therefore its use with a prescription does not violate federal law.

Even if the Court overlooks this pleading defect, Plaintiff does not claim (because she cannot) that the "law is applied in a discriminatory manner or imposes different burdens on different classes of people." Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995). The law applies equally to all users of medical marijuana, and nothing in § 922(g)(3), 27 C.F.R. § 478.11, or the Open Letter suggests otherwise. Instead, Plaintiff's argument is that medical marijuana users in certain states may more easily evade the law by purchasing firearms without notifying sellers that they use marijuana. This is not a proper equal protection claim, as the law facially applies to every marijuana user, even if some people are able—through deceit or fraud—to avoid prosecution or obtain a firearm. See United States v. Hendrickson, 664 F. Supp. 2d 793, 798 (E.D. Mich. 2009) ("There is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is enforced . . . . The law does not need to be enforced everywhere to be legitimately enforced somewhere." (internal quotation omitted)).

Furthermore, a marijuana registration card is only one of many pieces of evidence that an FFL located in any state can consider in determining whether a particular buyer is an "unlawful user of or addicted to a controlled substance." As set forth in the Open Letter, it is incumbent upon FFLs to consider "evidence of a recent use or possession of a controlled substance" during a potential sale of a firearm. The Letter notes that § 922(d)(3) "makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any persons knowing or **having reasonable cause to believe** that such person is an unlawful user of or addicted to a controlled substance." See Compl., Ex. 2-B. (emphasis in original). Citing 27 C.F.R. § 478.11, the Letter further states that "[a]n inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time." Id. A marijuana registry card is simply an example of the evidence that the FFL may consider, regardless of the state in which the sale takes place. Id.

V. DEFENDANTS HAVE NOT VIOLATED PLAINTIFF'S RIGHT TO SUBSTANTIVE OR PROCEDURAL DUE PROCESS.

Plaintiff argues in her opposition brief that Defendants have violated her right to procedural and substantive due process. Pl's Op. at 3-10. Neither of these claims was properly set forth in her Complaint. Though Plaintiff brings a claim under the Due Process Clause of the Fifth Amendment, this claim is unambiguously an equal protection claim, and not a claim based on procedural or substantive due process. See Compl. ¶¶ 52-57; Compl. Prayer for Relief, ¶ 2 (seeking a declaration that §§ 922(g)(3) and 922(d)(3) violate the Due Process Clause "by denying equal protection of the laws to law-abiding, qualified adults"). Accordingly, the Court should not address these "claims." See Broam, 320 F.3d at 1026 n.2; Ruiz, 2007 WL 1120350, at *26.

A. There is No Substantive Due Process Right to Use Marijuana for Medical Purposes.

In the event that the Court addresses the substantive or due process claims raised for the first time in Plaintiff's opposition brief, these claims have no merit. Plaintiff posits that she has a "substantive right to treat her medical condition in the manner recommended by her physician and which she and her physician agree is the [best] course of treatment for her." Pl's Op. at 7. Plaintiff appears to aim her substantive due process challenge at the Controlled Substances Act and its classification of marijuana as a Schedule I drug.[12] 21 U.S.C. § 812(c), Schedule I(c)(10).

[12] To the extent that Plaintiff's substantive due process "claim" may be read to implicate her Second Amendment rights, such a claim should be rejected. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing' such a claim." Albright v. Oliver, 510 U.S. 266, 266 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). Accordingly, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." United States v. Lanier, 520 U.S. 259, 272, n.7 (1997); see also Richards v. County of Yolo, --- F.Supp.2d ----, No. 2:09-CV-01235, 2011 WL 1885641, at *6 n.8 (E.D. Cal. May 16, 2011) ("Though the right to keep and bear arms for self-defense is a

(*Footnote continued on following page.*)

No matter how Plaintiff attempts to frame the right that she seeks to vindicate, the argument is foreclosed by Raich v. Gonzales, 500 F.3d 850, 861-66 (9th Cir. 2007) ("Raich II"), in which the Ninth Circuit rejected a nearly identical attempt to establish a fundamental right to use marijuana for medical reasons.

Substantive due process protects asserted rights only if they are "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Id. at 864 (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)). Under Glucksberg, a court is obligated to "carefully formulat[e]" a "narrow definition of the interest at stake," instead of accepting a plaintiff's broad rhetorical flourishes, before deciding whether substantive due process protects that interest. Id. at 863.

Here, though Plaintiff attempts to describe the substantial right at issue in terms of the right to seek medical treatment, she omits the central component of the right she seeks to vindicate: the use of marijuana in the course of her treatment. Plaintiff's articulation of her right is similar to the alleged right that the Raich II plaintiff sought to establish. Id. at 864 (noting that plaintiff's "carefully crafted interest" was "a fundamental right to 'mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life'"). The Ninth Circuit held that Raich's framing of the fundamental right was inaccurate because "[c]onspicuously missing from Raich's asserted fundamental right is its centerpiece: that she seeks the right to use marijuana to preserve her bodily integrity, avoid pain, and preserve her life." Id. (emphasis in original). As in Raich II, the right Plaintiff seeks to vindicate in this case is the right to use marijuana as the course of medical treatment.

With this interest in mind, Plaintiff fails the second part of the Glucksberg test, as the Ninth Circuit has rejected the existence of a fundamental right to use marijuana for medical

---

fundamental right, that right is more appropriately analyzed under the Second Amendment.") (citation and internal quotations omitted).

reasons. The right to use marijuana, even by persons who claim they need to use it to alleviate serious medical symptoms, does not meet the exacting standards required for the recognition of a new substantive due process right. The Raich II court, in analyzing whether the asserted right was "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty," concluded that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering." Id. at 866; see also Marin Alliance, 2011 WL 5914031, at *11 ("Finally—and significantly—it is difficult to reconcile the purported existence of a fundamental right to use marijuana for medical reasons with Congress' pronouncement that 'for purposes of the [CSA], marijuana has no currently accepted medical use at all.'" (citing United States v. Oakland Cannabis, 532 U.S. at 491)). Accordingly, even had Plaintiff adequately raised a substantive due process claim, the claim must be dismissed.[13]

B. Plaintiff's Procedural Due Process "Claim" Must Fail, as She Has Not Been Deprived of a Constitutionally-Protected Liberty or Property Interest.

Plaintiff further argues for the first time in her opposition brief that Defendants "deprived [her of her] fundamental rights in direct violation of the procedural requirements of the Due Process clause." Pl's Op. at 5. In the event the Court addresses this claim, Plaintiff fails to state a prima facie case to establish a procedural due process claim, which requires that Plaintiff allege facts showing: "(1) a deprivation of a constitutionally protected liberty or property interest, and

[13] Plaintiff cites a perceived "growing trend" in the number of states that have legalized the use of marijuana for medical purposes in an effort to show that "physicians believe cannabis has medicinal value and the public believes medical cannabis is a viable course of treatment." Pl's Op. at 7. Plaintiff's characterization of what physicians or the public believe notwithstanding, under federal law, marijuana "has no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1). More to the point, decriminalization measures in various states cannot retroactively create a "deeply rooted" history and tradition of a constitutional right to use marijuana, nor do those measures establish that a right to use marijuana is necessary to ensure that "liberty [and] justice would exist." See Raich II, 500 F.3d at 864.

(2) a denial of adequate procedural protections." Kildare v. Saenz, 325 F.3d 1078, 1085 (9th Cir. 2003). Plaintiff's claim cannot survive the threshold inquiry, as she has not been deprived of a constitutionally-protected liberty or property interest. See Erickson v. United States, 67 F.3d 858, 861 (9th Cir. 1995) (finding that the guarantee of procedural due process applies only when a constitutionally protected liberty or property interest is at stake). As stated, users of marijuana for medical purposes, like all users of controlled substances in violation of federal law, fall outside of the scope of the Second Amendment. Plaintiff, therefore, has not shown that the government has deprived her of any constitutionally-protected liberty or property interest. See Clark K. v. Willden, 616 F. Supp. 2d 1038, 1041-42 (D. Nev. 2007) (dismissing procedural due process claims where plaintiffs failed to set forth a proper constitutionally-protected interest).

VI. PLAINTIFF'S CONSPIRACY AND DAMAGES CLAIMS SHOULD BE DISMISSED.

Defendants moved to dismiss Plaintiff's conspiracy claim for lack of subject matter jurisdiction. Def. Mot. at 31-33. Plaintiff consents to the dismissal of this claim, Pl's Op. at 25 ("Plaintiff does not object to the dismissal of her conspiracy claim."), and it accordingly should be dismissed. In addition, to the extent that the Complaint could be construed otherwise, Plaintiff concedes that she may not pursue monetary damages against the United States. Def. Mot. at 30-31; Pl's Op. at 25.

* * *

CONCLUSION

For the reasons stated above and in Defendants' opening brief, the Court should grant Defendants' motion to dismiss (or in the alternative, enter summary judgment for Defendants), and deny Plaintiff's cross-motion for summary judgment.

Dated: March 30, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

DANIEL G. BOGDEN
United States Attorney

SANDRA M. SCHRAIBMAN
Assistant Director

/s/ John K. Theis
JOHN K. THEIS
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Rm. 6701
Washington, D.C. 20530
Telephone: (202) 305-7632
Facsimile: (202) 616-8460
John.K.Theis@usdoj.gov

Attorneys for Defendants the United States of America, ATF, U.S. Attorney General Eric Holder, Acting ATF Director B. Todd Jones, and Assistant ATF Director Arthur Herbert, in their official capacities (collectively, the United States)

PROOF OF SERVICE

I, John K. Theis, Trial Attorney with the United States Department of Justice, certify that the following individual was served with **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT** on this date by the below identified method of service:

Electronic Case Filing:

Charles C. Rainey Esq. (Bar No. 10723)
The Law Firm of Rainey Devine
8915 S. Pecos Road, Suite 20
Henderson, NV 89074
chaz@raineydevine.com

Attorney for Plaintiff

DATED this 30th day of March 2012.

/s/ John K. Theis
JOHN K. THEIS
Trial Attorney
United States Department of Justice

CHARLES C. RAINEY, ESQ.
Nevada Bar No. 10723
Chaz@raineydevine.com
JENNIFER J. HURLEY, ESQ.
Nevada Bar No. 11817
Jennifer@raineydevine.com
RAINEY DEVINE, ATTORNEYS AT LAW
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
Telephone: (702) 425.5100
Facsimile: (888) 867.5734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

S. ROWAN WILSON, an individual,

Plaintiff,

v.

ERIC HOLDER, as Attorney General of the United States; THE U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; B. TODD JONES, as Acting Director of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives; ARTHUR HERBERT, as Assistant Director of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives; and THE UNITED STATES OF AMERICA,

Defendants.

Case No. 2:11-cv-1679

FIRST AMENDED COMPLAINT

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

COMES NOW Plaintiff S. ROWAN WILSON (the "Plaintiff" or "Ms. Wilson") by and through her counsel Charles C. Rainey and Jennifer J. Hurley of the THE LAW FIRM OF RAINEY DEVINE, and hereby submits her Complaint against the Defendants ATTORNEY GENERAL ERIC HOLDER, THE U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ACTING DIRECTOR B. TODD JONES, ASSISTANT DIRECTOR ARTHUR HERBERT, and THE UNITED STATES OF AMERICA (collectively, the "Defendants"), inclusive, alleging as follows:

INTRODUCTION

1. This is an action to uphold the Constitutional right to keep and bear arms, which extends to all law-abiding adult citizens of the United States, and includes the right to acquire such arms.

2. The Second Amendment "guarantee[s] the individual right to possess and carry" firearms and "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2797, 2821 (2008).

3. However, in contravention of this fundamental constitutional right, the Defendants have prohibited a certain class of law-abiding, responsible citizens from exercising their right to keep and bear arms; the Defendants have enacted laws, policies, procedures and customs with the specific intent of denying the Second Amendment rights of persons who have registered to use medical marijuana pursuant to and in accordance with state law. The Defendants have deliberately banned such persons from purchasing handguns, or firearms of any kind, from federally licensed firearms dealers without providing any means of due process prior to depriving these persons of their rights.

4. Based on the Defendants' interpretation of Section 922(g)(3) of the federal criminal code, the law prohibits law-abiding adults who have obtained medical marijuana cards pursuant to state law from lawfully purchasing what the Supreme Court has called "the quintessential self-defense weapon" and "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 128 S.Ct. at 2818.

5. This blanket ban violates the constitutional rights of thousands of responsible, law-abiding American citizens and is thus invalid under the Second and Fifth Amendments.

THE PARTIES

6. Plaintiff S. ROWAN WILSON is a natural person and a citizen of the United States and of the State of Nevada. Ms. Wilson presently intends to acquire a functional

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

handgun for use within her home for self-defense but is prevented from doing so by Defendants' active enforcement of the unconstitutional policies complained of in this action. Ms. Wilson fears arrest, criminal prosecution, incarceration, and a fine if she were to acquire the aforementioned handgun. Indeed, Ms. Wilson has been unable to do so.

7. Defendant ATTORNEY GENERAL ERIC HOLDER heads the United States Department of Justice, which is the agency of the United States government responsible for enforcement of federal criminal laws. Defendant Holder, in his capacity as Attorney General, is responsible for executing and administering laws, customs, practices, and policies of the United States and is presently enforcing the laws, customs, practices and policies complained of in this action. Defendant Holder has ultimate authority for supervising all of the operations and functions of the Department of Justice.

8. Defendant U.S. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES ("BATFE") is an arm of the Department of Justice responsible for the investigation and prevention of federal offenses involving the use, manufacture, and possession of firearms. The BATFE also regulates, via licensing, the sale, possession, and transportation of firearms and ammunition in interstate commerce. The BAFTE is authorized to implement and enforce the federal law challenged in this case. BATFE is currently enforcing the laws, customs, practices and policies complained of in this action in Plaintiff's jurisdiction.

9. Defendant B. TODD JONES is the Acting Director of the BATFE and, in that capacity, is presently enforcing the laws, customs, practices and policies complained of in this action.

10. Defendant ARTHUR HERBERT is the Assistant Director of the BATFE and, in the capacity, is presently enforcing the laws, customs, practices and policies complained of in this action.

11. Defendant UNITED STATES OF AMERICA is a proper defendant in this action pursuant to 5 U.S.C. § 702.

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

JURISDICTION AND VENUE

12. This case concerns certain subject matter under the original and exclusive jurisdiction of the federal courts of the United States of America.

13. This action seeks relief pursuant to 28 U.S.C. §§ 2201, 2202, and 2412. Therefore, jurisdiction is founded on 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States.

14. The Defendants, including the BATFE, are subject to suit for relief other than money damages pursuant to 5 U.S.C. § 702.

15. This Court has authority to award costs and attorneys fees pursuant to 28 U.S.C. § 2412.

16. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

COMMON ALLEGATIONS

17. On October 4, 2011, Plaintiff S. Rowan Wilson ("Ms. Wilson"), an adult-aged, law-abiding, responsible citizen, sought to purchase a handgun to use for self-defense in her home. *See* **DECLARATION OF S. ROWAN WILSON**, attached hereto as Exhibit "**1**" and incorporated herein by reference.

18. That day, Ms. Wilson visited Custom Firearms & Gunsmithing in Moundhouse, Nevada, hoping to purchase a Smith & Wesson model 686 chamber in 0.357" magnum (hereinafter referred to as the "Firearm"). *Id*. at 4:26.

19. However, when Ms. Wilson began to fill out her application paperwork for the purchase of a gun, the gun shop's proprietor, Frederick Hauser ("Mr. Hauseur"), stopped Ms. Wilson from completing question 11.e on the application.

20. Question 11.e asked whether the applicant was addicted to or an unlawful user of a controlled substance.

21. Ms. Wilson's natural inclination was to answer Question 11.e as "no."

22. However, Mr. Hauseur explained to Ms. Wilson that because Ms. Wilson was the holder of a state-issued medical marijuana registry card, Ms. Wilson was automatically deemed an unlawful user of a controlled substance and therefore not someone that he

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8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

could sell a firearm to.

23. Mr. Hauseur further informed Ms. Wilson that he could not sell her a firearm without jeopardizing his federal firearms license. *Id*. at 5:32; *see* **DECLARATION OF FREDERICK JOHN HAUSEUR, IV**, attached hereto as Exhibit "**2**" and incorporated herein by reference.

24. Mr. Hauseur explained to Ms. Wilson that because of the mere fact that he was aware Ms. Wilson possessed a state-issued medical marijuana registry card he was prohibited from selling her the Firearm, any other firearm, or even any ammunition. Exhibit 1 at 5:32; Exhibit 2 at 3:12-14.

25. Roughly a week prior to Ms. Wilson's visit to Custom Firearms & Gunsmithing, Mr. Hauseur received notice of a letter dispatched by the BATFE to all federal firearms licensees, in which the BATFE specifically forbade the sale of any firearms or ammunition to any person possessing a state-issued medical marijuana registry card. *See* Exhibit 2-B.

26. Mr. Hauseur's refusal to sell Ms. Wilson the Firearm is the direct result of laws, policies, procedures and/or customs initiated and promulgated by the Defendants. *See* Exhibit 2 at 2:7-8; Exhibit 2-B; *see also* 18 USC 922(g)(3).

27. Ms. Wilson is a medical professional, who has, for some time, researched and studied the use of cannabis for medical purposes. *See* Exhibit 1 at 2-3.

28. Approximately three years ago, Ms. Wilson learned from a friend, who was suffering from severe endometriosis, that the use of cannabis can substantially mitigate, or even eliminate, the pain caused by persistent muscle spasms and other detrimental medical conditions. *Id*. at 2:14. Since that time, Ms. Wilson has extensively researched the efficacy of using cannabis as a medical treatment, including conducting interviews with a number of licensed physicians. *Id*. at 2:15. Most recently, Ms. Wilson met with Dr. Alan Shackelford, a practicing physician in Colorado and former fellow with the Harvard University School of Medicine, to discuss the use of cannabis as a medical treatment. *Id*. at 3:16-17.

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8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

29. Ms. Wilson is currently a resident of Carson City, Nevada, and has resided in the State of Nevada since September 2006. Exhibit 1 at 2:4-5.

30. Ms. Wilson holds a bachelor's degree from the University of Texas, Austin, and a master's degree from Jones International University of Colorado. *Id*. at 2:6-8.

31. For the past year, Ms. Wilson has worked as a professional caregiver and medical technician, most recently accepting a position with Carson Valley Residential Care. *Id.* at 2:8.

32. For the past few months, Ms. Wilson has been actively researching medical schools and has met with and shadowed a series of doctors, as she plans to pursue a doctor of osteopathy. *Id*. at 2:9-12.

33. Ms. Wilson has additionally met with dozens of patients that have communicated to her their positive experiences with medical cannabis. *Id*. at 3:18.

34. Most of these individuals are elderly persons suffering from serious ailments, who find substantial relief and curative benefits from the use of cannabis. *Id*. Most of the individuals Ms. Wilson has encountered certainly do not fit the commonly portrayed, narrow-minded stereotype of a marijuana user. *Id*. at 3:19.

35. Ms. Wilson's interest in the medical efficacy of cannabis stems, in part, from her own struggles with severe dysmenorrhea (also referred to as severe menstrual uterine contractions), and the possible treatment options that cannabis offers. *Id*. at 3:20. Since the age of ten (10), Ms. Wilson has suffered from severe dysmenorrhea, which is often debilitating, even leading to further painful side effects, such as severe nausea and cachexia. *Id*.

36. In the fall of 2010, Ms. Wilson decided to apply for a Nevada medical marijuana registry card. *Id*. at 3:21.

37. The Nevada State Constitution states, in relevant part, at Article 4, Section 38:

> "The legislature shall provide by law for: (a) The use by a patient, upon the advice of his physician, of a plant of the genus Cannabis for the treatment or alleviation of cancer, glaucoma, acquired immunodeficiency syndrome; severe, persistent nausea of cachexia resulting from these or other chronic or debilitating medical conditions; epilepsy and other disorders characterized by seizure; multiple sclerosis

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

> and other disorders characterized by muscular spasticity; or other conditions approved pursuant to law for such treatment."

38. Furthermore, Chapter 453A of the Nevada Revised Statutes provides a statutory framework specifically authorizing the issuance of medical marijuana registry cards to persons that have a doctor's recommendation for the use of medical marijuana.

39. In October 2010, in full compliance with Nevada law, Ms. Wilson obtained and submitted an application for a Nevada State-issued medical marijuana registry card. Exhibit 1 at 3:21-24; *see also* Exhibit 1-B.

40. Ms. Wilson obtained a doctor's recommendation for the use of medical marijuana, as required by Nevada law and submitted all of the appropriate paperwork to the State. *Id*. at 3:22.

41. On May 12, 2011, Ms. Wilson was issued a medical marijuana registry card from the State of Nevada. *Id*. at 3:24; *see also* Exhibit 1-B.

42. Approximately five months later, on October 4, 2011, when Ms. Wilson attempted to purchase the Firearm, the owner of the gun store, Fred Hauseur, denied Ms. Wilson's right to purchase the Firearm based solely on the fact that she possessed a valid State of Nevada medical marijuana registry card. Exhibit 2 at 3:12-13.

43. In denying Ms. Wilson's attempted purchase of the Firearm, Mr. Hauseur reasonably relied on the instructions directly provided by the BATFE. On or about September 21, 2011, the BATFE issued an open letter to all federal firearms licensees in which the BATFE specifically instructed firearms licensees to deny the sale of firearms or ammunition to any person whom the licensee is aware possesses a card authorizing such person to possess and use marijuana under state law. *Id.* at 2:7-8; *see also* Exhibit 2-B.

44. Mr. Hauseur received the BATFE open letter on or about October 1, 2011. *Id*. at 2:7. As a direct result of the open letter, Mr. Hauseur was compelled to deny Ms. Wilson's attempt to purchase the Firearm. *Id*. At 2:12-14.

45. Furthermore, each purchase of a firearm requires that the purchaser complete Form 4473, as provided by the BATFE. Question 11(e) of Form 4473 asks, "Are you an

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8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?" Exhibit 1 at 4:29.

46. While Ms. Wilson's natural inclination would be to answer "No" to question 11(e), Ms. Wilson was informed by Mr. Hauseur that the BATFE has promulgated a policy whereby any person holding a medical marijuana registry card is automatically considered an "unlawful user of, or addicted to marijuana." *Id*. at 4:30.

47. Because Ms. Wilson holds a valid medical marijuana registry card issued by the State of Nevada, but is clearly not an unlawful user of or addicted to marijuana, Ms. Wilson elected to leave question 11(e) on Form 4473 blank. *Id*. at 4:31.

48. Nevertheless, when Ms. Wilson provided Form 4473 to Mr. Hauseur, Mr. Hauser informed her that, even with Question 11(e) left blank, he could not sell her a firearm without jeopardizing his federal firearms license, since he had actual knowledge that Ms. Wilson possesses a state-issued medical marijuana registry card. *Id*. at 5:32; Exhibit 2 at 3:12-14.

49. Ms. Wilson has never been charged with or convicted of any drug-related offense, or any criminal offense for that matter. Indeed, no evidence exists that Ms. Wilson has ever been an "an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance." Ms. Wilson maintains that she is not an unlawful user of or addicted to marijuana or any other controlled substance. Nonetheless, Ms. Wilson was denied her Second Amendment right to keep and bear arms based solely on her possession of a valid State of Nevada medical marijuana registry card.

I.

FIRST CAUSE OF ACTION

(VIOLATION OF 2nd AMENDMENT)

50. Plaintiff hereby incorporates by reference paragraphs one (1) through forty-nine (49) as though fully set forth herein.

51. Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

of Federal Regulations ban federally licensed firearms dealers from selling firearms to any person "who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

52. The Defendants have implemented and are enforcing a policy whereby any person who possesses a medical marijuana card validly issued pursuant to State law or any person who a federally licensed firearms dealer "reasonably suspects" possesses a medical marijuana card validly issued pursuant to State law is summarily and conclusively deemed to be "an unlawful user of or addicted to any controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

53. Thus, any person who possesses a medical marijuana card validly issued by pursuant to State law may not purchase a firearm from any federally licensed firearms dealer without committing a federal offense under Title 18, Section 922(g)(3) and Title 27, Section 478.11, and a federally licensed firearms dealer may not sell a firearm to any person who he knows or "reasonably suspects" possesses a medical marijuana card validly issued pursuant to State law without committing a federal offense under Title 18, Section 922(d)(3).

54. As a result of Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code of Federal Regulations and the Defendants' ruling that any person who possesses a medical marijuana card validly issued pursuant to State law is conclusively deemed to be "an unlawful user of or addicted to any controlled substance as defined in section 102 of the Controlled Substances Act" the Plaintiff has been denied her Second Amendment right to obtain and possess a handgun.

55. These laws and policies infringe upon, and impose an impermissible burden upon, the Plaintiff's right to keep and bear arms under the Second Amendment to the United States Constitution.

56. As a direct and proximate result of the foregoing law, policy, practice and/or procedure, as enacted and promulgated by the Defendants, the Plaintiff has suffered and continues to suffer damages.

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

57. The Plaintiff has incurred attorney's fees and costs as a direct result of prosecuting the present court action.

II.

SECOND CAUSE OF ACTION

(VIOLATION OF EQUAL PROTECTION CLAUSE OF THE 5th AMENDMENT)

58. Plaintiff hereby incorporates by reference paragraphs one (1) through fifty-seven (57) as though fully set forth herein.

59. Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code of Federal Regulations ban federally licensed firearms dealers from selling firearms to any person "who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

60. The Defendants have implemented and are enforcing a policy whereby any person who possesses a medical marijuana card validly issued pursuant to State law is automatically and conclusively deemed to be "an unlawful user of or addicted to any controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

61. As a result of Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code of Federal Regulations, and the Defendants' policy regarding persons who possesses a valid medical marijuana card issued pursuant to state law, the Plaintiff is being treated differently from similarly situated individuals.

62. Specifically, Plaintiff is being treated differently from persons who are prescribed medical marijuana in states where the obtainment of a state-issued medical marijuana registry card is not required. Because Plaintiff lives in a state where she is required to obtain a medical marijuana card prior to invoking any of the rights or benefits set forth in her state's statutes regarding medical marijuana and Plaintiff has followed such laws, she is automatically determined by Defendants to be an "unlawful user" of marijuana by Defendants regardless of whether or not she actually uses marijuana, and based on the Defendants' conclusory determination is denied her second amendment rights.

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Meanwhile, a person who lives in a state where a registration card is not required who is prescribed marijuana by his or her doctor is not automatically presumed to be an "unlawful user" of marijuana by the Defendants. Thus, Plaintiff is being treated differently from similarly situated persons.

63. Plaintiff is also being treated differently from similarly situated persons with similar medical conditions to those of the Plaintiff. The Plaintiff has been denied her right to purchase a handgun based on the Defendants' classification of Plaintiff as an "unlawful user" of marijuana simply because she has followed state laws for the obtainment of a method of treatment for her medical condition. Other similarly situated individuals who likewise pursue different methods of treatment for medical conditions have not been denied their ability to obtain handguns.

64. These laws and policies violate the Plaintiff's right to equal protection of the laws guaranteed under the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

65. As a direct and proximate result of the foregoing law, policy, practice and/or procedure, as enacted and promulgated by the Defendants, the Plaintiff has suffered and continues to suffer damages.

66. The Plaintiff has incurred attorney's fees and costs as a direct result of prosecuting the present court action.

III.

THIRD CAUSE OF ACTION

(VIOLATION OF PROCEDURAL DUE PROCESS CLAUSE OF 5th AMENDMENT)

67. Plaintiff hereby incorporates by reference paragraphs one (1) through sixty-six (66) as though fully set forth herein.

68. Plaintiff possesses a protected liberty interest, namely, her right to possess a firearm under the Second Amendment.

69. The Defendants took legislative action by adopting a policy whereby any person who possesses a medical marijuana card validly issued pursuant to State law is

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automatically and conclusively deemed to be "an unlawful user of or addicted to any controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" and therefore such a person cannot purchase a handgun from a federally licensed firearms dealer without committing a federal offence under Title 18, Sections 922(g)(3) and Title 27, Section 478.11 of the Code of Federal Regulations. Such policy is not merely interpretive.

70. Defendants deprived the Plaintiff of her protected liberty interest through their promulgation of their policy whereby any person who possesses a medical marijuana card validly issued pursuant to State law is automatically and conclusively deemed to be "an unlawful user of or addicted to any controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" and therefore such a person cannot purchase a handgun from a federally licensed firearms dealer without committing a federal offence under Title 18, Sections 922(g)(3) and Title 27, Section 478.11 of the Code of Federal Regulations.

71. The Defendants have denied the Plaintiff adequate procedural protections before depriving her of her right to purchase and possess a firearm. Defendants did not issue any notice or hold any hearing prior to depriving the Plaintiff of her right. Defendants also have not offered any means for the Plaintiff to reclaim her right. In violation of the Plaintiff's right to procedural due process, the Defendants have unilaterally and conclusively determined without any reason or supporting evidence that the Plaintiff is an "unlawful user" of marijuana simply because the State of Nevada has conferred on her the right to use medical marijuana.

72. As a direct and proximate result of the Defendants' above-described actions, the Plaintiff has suffered and continues to suffer damages.

73. The Plaintiff has incurred attorney's fees and costs as a direct result of prosecuting the present court action.

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8915 S. Pecos Road, Ste. 20A
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+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

IV.

FOURTH CAUSE OF ACTION

(VIOLATION OF SUBSTANTIVE DUE PROCESS CLAUSE OF 5th AMENDMENT)

74. Plaintiff hereby incorporates by reference paragraphs one (1) through seventy-three (73) as though fully set forth herein.

75. The Plaintiff's right to possess a handgun under the Second Amendment is objectively deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.

76. While it has been recognized that the Second Amendment is not unlimited and restrictions prohibiting felons from possessing firearms are valid, the Plaintiff's mere possession of a validly issued state medical marijuana card does not make her a felon nor does it mean that the Plaintiff has ever even used marijuana.

77. At the same time, Plaintiff possesses a fundamental right to free speech under the First Amendment which includes certain non-verbal speech which, in this case, is the possession of a medical marijuana registry card validly issued pursuant to state law.

78. Through Title 18, Sections 922(g)(3) and 922(d)(3) and Title 27, Section 478.11 of the Code of Federal Regulations, and their policy whereby any person who possesses a medical marijuana card validly issued pursuant to State law is automatically and conclusively deemed to be "an unlawful user of or addicted to any controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" and thereby prohibited from purchasing a handgun from a federally licensed firearms dealer without committing a federal offence, Defendants have deprived Plaintiff of her substantive due process.

79. As a direct and proximate result of the Defendants' above-described actions, the Plaintiff has suffered and continues to suffer damages.

80. The Plaintiff has incurred attorney's fees and costs as a direct result of prosecuting the present court action.

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

V.

FIFTH CAUSE OF ACTION

(VIOLATION OF 1st AMENDMENT)

81. Plaintiff hereby incorporates by reference paragraphs one (1) through eighty (80) as though fully set forth herein.

82. Under the First Amendment, Plaintiff possesses a fundamental right to free expression in the forms of freedom of association and free speech including certain non-verbal speech and communicative conduct, which, in this case, includes, without limitation, the acquisition, possession, and acknowledgment of possession of a medical marijuana registry card validly issued pursuant to state law.

83. The legalization of marijuana for medicinal purposes has been for years, and continues to be, a matter of political debate throughout the United States,

84. Largely as a result of voter initiatives, eighteen (18) states and the District of Columbia have legalized the use of marijuana for medical purposes.

85. By acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff is exercising her First Amendment right to free speech.

86. By acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff is expressing her support for and advocacy of legalization of medical marijuana.

87. Her medical marijuana registry card is a tangible symbol of her belief and opinion that marijuana should be legal for medical use, and a symbol of her belief and opinion that her fellow citizens of Nevada were correct to have forced changes to Nevada law legalizing marijuana for medical use.

88. Her political and personal opinions about medical marijuana are inherent in her discussions with others about the fact that she has a medical marijuana card.

89. By acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff was exercising her First Amendment right to freely associate with others who support and advocate the legalization of marijuana for medical use.

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90. The Plaintiff's medical marijuana registry card is a facial and express statement of her association with a group – medical marijuana cardholders - that embodies the belief and opinion that citizens in each state have a right to decide whether marijuana should be legal for medical purposes.

91. By acquiring, possessing, and acknowledging possession of a medical marijuana registry card, Plaintiff expresses her support for medical marijuana and her deeply held beliefs that marijuana should be legal for medical use.

92. The Plaintiff is, literally, a card-carrying advocate for medical marijuana, who is associated with a distinct group, identifiable by their inclusion in the medical marijuana registry.

93. Under the First Amendment, a citizen has the right to be free from governmental action taken to retaliate against the citizen's exercise of First Amendment rights and also has the right to be free from governmental action taken to deter the citizen from exercising those rights in the future.

94. By implementing and enforcing a policy that forbids a federally licensed firearms dealer from selling a firearm to any person who possesses a medical marijuana card or to any person who a federally licensed firearms dealer "reasonably suspects" possesses a medical marijuana card, Defendants are retaliating against Plaintiff's exercise of her First Amendment rights by denying her Second Amendment right.

95. Further, Defendants are also attempting to deter her from exercising her First Amendment rights in the future by requiring that she give up her First Amendment rights in exchange for her Second Amendment rights.

96. As a direct and proximate result of the Defendants' above-described actions, the Plaintiff has suffered and continues to suffer damages.

97. The Plaintiff has incurred attorney's fees and costs as a direct result of prosecuting the present court action.

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RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the court enter judgment in her favor and against Defendants as follows:

1. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the right to keep and bear arms as secured by the Second Amendment to the United States Constitution.

2. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the Due Process Clause of the Fifth Amendment to the United States Constitution.

3. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

4. Declare that 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, violate the right to free speech secured by the Second Amendment to the United States Constitution.

5. Permanently enjoin the Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them from enforcing 18 U.S.C. §§ 922(g)(3) and 922(d)(3) and any and all derivative regulations, such as 27 C.F.R. § 478.11, and the policy set forth in the Defendants' open letter to federally licensed firearms dealers dated September 21, 2011, and provide such further declaratory relief as is consistent with the injunction.

6. Award the Plaintiff compensatory and punitive damages.

7. Award costs and attorneys fees and expenses to the extent permitted under 28 U.S.C. § 2412.

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

8. Grant such other and further relief as the Court deems just and proper.

Dated this 17th day of December 2012.

Respectfully Submitted by:

RAINEY DEVINE, ATTORNEYS AT LAW

By: /s/ Chaz Rainey

Charles C. Rainey, Esq.
Nevada Bar No. 10723
Chaz@raineydevine.com
Jennifer J. Hurley, Esq.
Nevada Bar No. 11817
Jennifer@raineydevine.com
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
Telephone: +1.702.425.5100
Facsimile: +1.888.867.5734
Attorneys for Plaintiff

RAINEY • DEVINE
8915 S. Pecos Road, Ste. 20A
Henderson, Nevada 89074
+1.702.425.5100 (ph) / +1.888.867.5734 (fax)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE HON. GLORIA M. NAVARRO, U.S. DISTRICT JUDGE, PRESIDING

S. Rowan Wilson, Plaintiff, vs. Eric H. Holder, Jr., et al., Defendants.	**Case No. 2:11-cv-01679-GMN-PAL** **Motion Hearing** **CERTIFIED COPY**

TRANSCRIPTION OF PROCEEDINGS

Friday, November 2, 2012

APPEARANCES:	See Next Page
DIGITALLY RECORDED:	9:13:52 a.m. to 10:43:20 a.m.
TRANSCRIBED BY:	ELLEN L. FORD (702)366-0635

Proceedings recorded by electronic sound recording, transcript produced by mechanical stenography and computer.

APPEARANCES:

For the Plaintiff:

CHARLES C. RAINEY, ESQ.
The Law Firm of Rainey Devine
8915 South Pecos Road
Suite 20
Henderson, Nevada 89074
(702) 425-5100
email: chaz.rainey@raineylegal.com

For the Defendant:

JOHN KENNETH THEIS, ESQ.
U.S. Department of Justice
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
(202) 350-7632
email: john.k.theis@usdoj.gov

LAS VEGAS, NEVADA; Friday, November 2, 2012; 9:13:52 a.m.

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P R O C E E D I N G S

THE COURT: Thank you. You may be seated.

DEPUTY CLERK: Now calling the case of S. Rowan Wilson versus Eric Holder. Case number 2:11-cv-1679-GMN-PAL, regarding motion hearing.

Counsel, please note your appearances for the record.

MR. THEIS: Go ahead.

MR. RAINEY: Chaz Rainey here on behalf of the Plaintiff, S. Rowan Wilson.

THE COURT: And good morning, Mr. Rainey. And good morning, Miss Wilson.

MR. THEIS: John Theis on behalf of the Defendants.

THE COURT: And good morning, Mr. Theis. So it's Theis?

MR. THEIS: Theis.

THE COURT: Not T-h, not thise (phonetic). It's spelled T-h, but it's pronounced with a T.

MR. THEIS: That's correct.

THE COURT: All right. Thank you, Mr. Theis. Good morning. And did you come in from Washington, D.C.?

MR. THEIS: I did.

THE COURT: Okay. Well, we're glad we were able to have you here with us. We weren't sure there for a while with

the hurricane if you were going to be able to be here. So I'm glad to see that you're safe and sound.

I appreciate that you all probably are prepared to present oral arguments to me. I'm hoping that it would be helpful to you for me to explain -- go ahead and be seated -- my inclinations at this point.

I still have an open mind. I want to know whether you agree or disagree with my initial thoughts on the matter. There has been some changes in the law since you all finished the briefing, so that might be important for you to explain to me how you think that does or does not affect your position in this case.

So I'll just go over very briefly -- obviously, we're talking about the Federal Gun Control Act and two particular sections of Title 18 of the United States Code § 922(g)(3) and (d)(3).

As to the CFR, the Code of Federal Regulation, that's at issue at Title 27 § 478.11.

It's important to me to figure out which one of the two inferences of current use apply and, of course, the ATF Open Letter.

So first of all, looking at the Administrative Procedures Act at Title 5 of the United States Code § 553, which says, "Any proposed rule must undergo notice and comment unless the rule is interpretative."

I want to know your thoughts and whether you think that the particular rule at issue is interpretative. And the one we're speaking of is at Federal code -- the Federal regulation that states that, "An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance, or a pattern of use or possession that reasonably covers the present time." And so that is the definition of "unlawfully user" as used in the Federal Gun Control Act.

It appears that the question might turn on whether or not this rule issued by the ATF Letter and whether it's an interpretation. Is it an interpretative rule or is it a legislative rule? If it is a legislative rule, if it's something that Congress has delegated power to the Agency, and the Agency is intending to use that power to promulgate the rule at issue, then, obviously, it would be a legislative rule and then it would require comment and notice.

However, if, in fact, that rule is issued by the Agency just to advise the public of its own interpretation and construction of the statute which -- in regards to the rule which it administers, then it is an interpretative rule, and in that case would not be subject to notice and comment. It's just reflecting on the construction of the statute, and it's a statute which has been entrusted to the Agency to administer.

So looking at the Firearms Import/Export Roundtable

Trade Group versus Jones case, which is the D.C. District Court case in 2012 recently, it -- they did determine that a different ATF Letter -- not this Open Letter but a different ATF Letter -- was interpretative and, thus, did not require comment and notice. So if you think that that case applies or doesn't apply here in some way, please let me know.

I would like for, if possible, for the Plaintiff to clarify whether or not she is challenging only the statute, the two subsections of the statute, or also the regulation itself. Is she seeking review of that ATF stated policy in the Open Letter only, or is she also challenging the statutes?

Because I'm not -- I'm not sure they're all the same thing. You know. They could be different things. You could say, well, the statute may be constitutional, but this interpretation doesn't apply. I don't want to put words in your mouth, but I want to make sure that I'm clear on what your position is.

If it's only the policy's affect on those two statutes in the regulation that keeps her from procuring the gun, then I want to know if that's -- if that's what your position is.

Also, if the ATF Open Letter requires notice and comment or not. Is it an interpretative rule or is it a legislative rule?

How much deference should the Court give to the ATF's interpretation? It's their interpretation. How binding is

that? Does it have any precedential affect at all?

Do the answers to, you know, all of these questions that I'm kind of throwing at you for the first time -- and I appreciate if you can't answer them right now -- but how does that affect my determination of the merits of the action? And, of course, then there's the question of jurisdiction.

Looking more specifically at Section 922(g)(3) which is the portion of the Federal Gun Control Act that makes it unlawful for users of controlled substances to actually possess the guns, looking at that specifically, and the Dugan case, which is a Ninth Circuit case recently in 2011 that was decided after the Heller case, the Supreme Court Heller case. In Dugan they upheld Congress' ability to prohibit illegal drug users from possessing firearms.

So it appears to me that, regardless of the state law on the issue of medical marijuana, marijuana does still remain unlawful under the Federal law, so it seems like this claim would be barred by that Ninth Circuit precedent as issued by Dugan.

So tell me if you disagree or why that may not be -- maybe that is not a complete -- doesn't completely prevent me from considering the issue if there's another way for me to look at it. But it does seem to me that that is a bar.

As to the 922(d)(3), which is the section that prohibits firearm sales to persons that the firearm seller

knows or has reason to believe -- reasonable cause to believe is an unlawful user, that one is perhaps a little easier in a sense that under the Fourth Circuit's Chavin case -- C-h-a-v-i-n -- the Court did know that, "The challenged law will only impose a burden on the conduct that is falling within the scope of the Second Amendments' guarantee if the conduct was understood to be within that scope at the initial time, at the original time of its ratification."

And so with that in mind, the Fourth Circuit determined -- they analyzed that at the time of the ratification of the Second Amendment, they weren't intending to protect an individual's right to sell firearms as opposed to possess firearms. And so it does appear that, because Congress can constitutionally preclude illegal drug users -- the key there being illegal -- drug users from possessing a firearm, Congress likewise could prevent sellers from selling a firearm.

So it looks to me -- I'm inclined to believe that the Second Amendment probably does not include a right to sell firearms and ammunition. So is that a complete bar or, again, is there another way of looking at it?

Also, I'm not sure as to that particular subsection whether there's a standing question there that needs to be addressed.

As to the constitutional analysis, obviously, we need to decide which one of the levels of scrutiny apply. Is it

rational? Is it intermediate? Is it strict?

So the Government is arguing that it's the intermediate scrutiny, and the Plaintiff is arguing it's strict scrutiny.

The Government did rely on a series of cases, including the Nordyke case that was prior to the En Banc decision. So now we've had the En Banc decision at Nordyke, so I'd like you to explain to me how that does or doesn't change your position.

Let's see. I did look at U.S. v Carter, which is a Fourth Circuit's 2012 case finding that intermediate scrutiny, not strict scrutiny, applied.

I'm not sure that I'm persuaded that it's strict scrutiny. Most of the cases I believe do point towards intermediate scrutiny. Of course, there is that Nordyke case which found that it was actually a rational basis, but it was county -- that was the County Code violation for possessing the firearms or ammunition on County property. Not everywhere, but just on County property. So maybe that's the distinction. You can let me know what you think I should do or not do in regards to how Nordyke affects the issues here today.

Let's see. Substantive due process. The Fifth Amendment claims. There's the substantive due process or procedural due process and the equal protection as to the substantive due process.

I think looking at the Raich -- and I'll spell that for the record, R-a-i-c-h -- v Gonzales case, which is the Ninth Circuit 2007 case, it does appear that the Ninth Circuit's already held that there's no constitutionally protected right to use marijuana for medical purposes.

I know there's the litany of right to abortion under the Planned Parenthood case, right to use contraceptives under the Eisenstadt case, right to refuse lifesaving hydration and nutrition under the Cruzan case. But the Raich case is a Ninth Circuit case, so it does have direct precedential value on my -- my court, you know, my jurisdiction. As opposed to if it's a different district, it's something I consider and give preferential treatment to but not necessarily directly controlling. But a Ninth Circuit case is directly controlling on this Court. So tell me why you think that can be distinguished, if you think it can.

Also, the questions regarding procedural due process and equal protection. I just think those are very weak. If you think that there's -- you know, I want you to use your time wisely. So if you think that you still want to convince me that those are issues that should -- that you can explain sufficiently to survive a Motion to Dismiss, go ahead and tell me. But if you don't want to spend too much time on those and just spend more time on the others that seem to be probably more viable at this point, that's up to you.

The conspiracy claim also was dismissed already voluntarily by the Plaintiff so we don't need to go into that at all.

That's kind of my inclination and those are my questions. And since this is the Defendant's Motion to Dismiss, we'll go ahead and allow the defense to go ahead and speak first, and then we'll have a response from the Plaintiff, and then a reply from the Government, because it is your motion.

And then I most likely will not render a decision today. I think this is as much of a decision as you probably will get today as far as my -- what my inclinations are. I'll take it under submission at the end and issue a written ruling as soon as I can.

All right. So go ahead, Mr. Theis.

MR. THEIS: All right. Thank you, Your Honor.

At the outset, on your concerns about what I would call sort of the APA type concerns. Much of this issue is not fully presented in the -- in the Complaint or in the briefing that was submitted to the Court. So I will give sort of our initial impression to the questions that the Court's raised, but if possible, I'd like to reserve -- and if the Court would like this, we'd be happy to do this -- the opportunity to submit for the briefing on this particular question and answer the specific questions that the Court has on that issue.

So if I can put that to the side for the moment and talk about the constitutional claims which are before the Court, if that -- if that works for Your Honor.

THE COURT: So which particular issue do you want to supplement?

MR. THEIS: What you first addressed. The question of whether or not this particular regulation and the Open Letter qualifies as an interpretative rule, what level of deference is required for this particular -- for the letter.

Those issues were -- the 7-0 -- though the APA was mentioned in the Complaint, it's only the waiver of sovereign immunity element of this, so there's no APA claim brought before the Court in this Complaint, so that's why this issue was not fully fleshed out.

And so that's why I'd like to hold on that particular question just for now. And in the course of this, if we get further answers on this, I'd be happy to give them.

THE COURT: All right. And there's a standing issue, as well.

MR. THEIS: That's correct.

THE COURT: Because she's not a seller, she's a buyer -- a potential buyer not a seller. So --

MR. THEIS: That's correct.

THE COURT: -- there's a standing question, too.

MR. THEIS: On that, Your Honor, I believe there's --

we did not, you know, specifically raise that individual question. But yes, that is something that, obviously, the Court needs to look to its jurisdiction first, and if that's something that the Court can't find, that she is not -- doesn't have standing to raise this issue, then that's -- that's where we are.

To the constitutional issues. First, as -- as the Court correctly pointed out, the use of marijuana is prohibited under Federal law. Though certain states have -- such as Nevada issued past laws that suggest that the use may be used for medical purposes under state law, that is not recognized under Federal law.

So the individual registry card that she has here, which is the core of this case, does not prohibit her from any -- from -- that does not give her the right to use marijuana.

And that -- that concept sort of applies to several different issues in the claims that she's raised, and so we wanted to make that in the outset.

And as Your Honor points out, on 922(g)(3), the possession of -- of a controlled substance, we believe that is foreclosed by Dugan. There's no further need to engage in another constitutional analysis based on that. It's -- Dugan squarely held that Congress may prohibit the legal drug users from possessing firearms and that doesn't -- the Second

Amendment does not change that analysis, and so that's where we are on that.

On the independent constitutional analysis that -- the Court does need to take that second step, we agree, as we pointed out in our briefs, that intermediate scrutiny is appropriate.

As to Nordyke, the original panel hearing was vacated by the En Banc decision. And so it's -- it's not exactly clear where the Ninth Circuit stands on this on the level of scrutiny, but I will say that every Court to address both the level of scrutiny required for 922(g)(3) and for every other section of 922(g) has held that intermediate scrutiny applies, and that's why we've argued in our brief that intermediate should apply.

And the reasons behind that are, one, that the level of burden that we're talking about here for 922(g)(3) is relatively low. An individual who is prohibited from purchasing a firearm by the -- it's a temporal scope to what is included in 922(g)(3). And so an individual can just stop using unlawful drugs and that would then allow them to -- to purchase a firearm.

Because of that temporal scope, because there's not as great a burden as there would be, some courts have said that that's a reason to use definitely less than strict scrutiny, but that intermediate scrutiny is appropriate.

And then, two, the actual constitutional analysis itself, this statute has the compelling Government interest of protecting against public safety and preventing violent crime. And that's -- as we've demonstrated in our brief, there's reasonable fit between that compelling interest and the regulations that are at issue here.

We cite a wide variety of sources that demonstrate this -- that between those -- the interest and the regulation, including the legislative history, the fact that the majority of states have made the same determination, which the Yangtze Court in the Seventh Circuit found important for this question. And finally, the academic and empirical studies that we've cited that show this connection between crime and the use of marijuana.

So all of that in connection with the temporal scope point to -- this is the reason why all these courts have used intermediate scrutiny in the Court. If it does an independent constitutional analysis, it should use that, as well.

On (d)(3), we agree that Chavin forecloses this. This is -- no Court has recognized -- and it is clear from the nature of the right -- that the laws imposing conditions and qualifications on the commercial sale of arms, that there's -- that there's no corresponding restriction for the sale of -- or I'm sorry -- protection for the sale of firearms.

Heller articulated the right as -- the core right as the

right of law abiding, responsible citizens to use firearms in the hearth and home. There's no -- as Chavin pointed out, there's no corresponding right to sell firearms in that case. So we -- on the substantive issue, separate from the standing issue, that we agree with that -- or that's the position that the Court should take.

Your Honor asked about two other -- the Fifth Amendment claims. First on the -- it's our position the Complaint does not lay out a Fifth Amendment substantive or procedural due process claim, as we pointed out in our briefs. This was raised for the first time in the opposition to our Motion to Dismiss, and Plaintiff can't amend their Complaint to add these different claims.

But even if the Court were to address those claims, as the Court properly pointed out, Raich -- the Ninth Circuit opinion of Raich 2, has held that there is no substantive due process right to use marijuana, even if it's for medical purposes, under state law. And that -- and that squarely forecloses the substantive due process claim.

So those are the --

THE COURT: Can we go back to the 922(d)(3) claim, though? Because I'm not sure if you addressed whether or not you believe that the Plaintiff has standing to raise that claim.

MR. THEIS: If I could, Your Honor, I'd like to hold

on answering that specific question. We didn't address that in our briefs because there are cases that have held that the denial of the right to possess -- or to use firearms and possess firearms, that that right alone gives you -- that that denial gives you standing, and I -- I'd like to confirm that that's been used in the same context of the 922(d)(3) for the sale. So that's why we didn't raise a specific standing argument in our briefs, and that's why we didn't put that as our first point that we would make in this case.

But -- but obviously, if Plaintiff is -- so I'd like to hold off and take a brief look at some notes that I have on that particular question because I want to give the Court the correct answer on the standing issue, essentially.

THE COURT: Why don't you take a look now, because that's important to me.

MR. THEIS: And other -- other than those particular issues, I believe I've addressed everything other than, again, that APA issue which we discussed at the outset.

THE COURT: Just a minute. I just want him to have a chance to look at --

MR. RAINEY: Oh, I'm sorry.

THE COURT: You weren't all -- were you completely done, Mr. Theis, or --

MR. THEIS: Other than the standing issue and the APA issue which we've -- I would like to do a bit more digging on

that particular question. I think we're done with the rest of our argument, though.

THE COURT: Okay. Well, but before we go over to Plaintiff --

MR. THEIS: Okay.

THE COURT: -- please go ahead and take a look at your thoughts on standing.

(Pause in the proceedings.)

THE COURT: Mr. Theis, since you're going to be -- I'll go ahead and grant your motion -- your oral motion to have supplemental pleadings on the Administrative Procedures Act issue. If -- if you're going to already be doing that anyhow, perhaps we'll -- I'll go ahead and allow more briefing on the standing issue and that will give Plaintiff an opportunity, as well, to be able to do a little research and guide the Court as to whether you think that, under the APA, you know, which states that if there's a rule that's proposed by an agency, if it's an interpretative rule -- and I'll spell that for the record again, i-n-t-e-r-p-r-e-t-a-t-i-v-e -- if it's an interpretative rule -- doesn't roll off the tongue very easily, does it? -- then there need not be any comment and notice. But if it is a legislative rule then there does need to be.

And so I think that's important to look at, and so I'll go ahead and allow both parties to provide further briefing on that issue, and on the issue of standing -- of the

Plaintiff's standing.

And we'll set a briefing schedule after we're done here so that my -- my clerk can have a -- have some time to do that calculation.

So is there anything else, Mr. Theis, that you want to say? And I don't mean to rush you at all. In fact, I have the entire morning set aside for this. So I expected this would be more in-depth and would take longer. So feel free, if you have other things that you want to get into.

MR. THEIS: Nothing further, Your Honor, but I would like to reserve any time, obviously, to rebut any specific points that were made. But we've made the majority that we'd like for now, and we'll rest on our briefs on the rest.

THE COURT: All right. Thank you. All right. Mr. Rainey?

MR. RAINEY: One moment, Your Honor. Good morning, Your Honor.

THE COURT: Good morning. I was very intrigued by the issue.

MR. RAINEY: Yes, it's a fun one.

THE COURT: Yes, it is a fun one. And there isn't really anything directly on point in any other of the circuits.

MR. RAINEY: No.

THE COURT: So it is a very interesting one, and I think a very important question.

MR. RAINEY: Mm-hmm.

THE COURT: So I am interested to hear what -- what else you have to add to this so far beyond what has already been provided in the briefings.

MR. RAINEY: Well, Your Honor, I want to begin by -- by making it clear that we are challenging, not just the letter, and not just the regulation, but also the statute.

Now, we -- as we do that, we recognize that challenging the statute is a -- an uphill battle. It's a long-established -- sorry -- long-established statute. We're not -- we're not trying to deny that.

However, we have to begin from the fundamental preposition -- proposition that, under D.C. v Heller, the Second Amendment was interpreted as an individual fundamental right, and that was reiterated later by the U.S. Supreme Court.

And prior to that -- and I think we all can agree -- that prior to that it was very much up in the air as to how the Supreme Court would interpret the Second Amendment. And so from there we have a very different proposition.

THE COURT: Well, the Court specifically held that the right was not unlimited.

MR. RAINEY: That's correct.

THE COURT: They did say that the Government can prohibit possession of weapons in some scenarios without running afoul of the Second Amendment.

MR. RAINEY: Mm-hmm.

THE COURT: For example, prohibiting the possession of firearms by felons or mentally ill persons.

MR. RAINEY: Mm-hmm.

THE COURT: So it sounds like this is an as-applied constitutional challenge?

MR. RAINEY: Mm-hmm, yes. So the question here is, as applied in those two statutes, as applied in the corresponding regulations and, of course, as applied in that letter, the ATF Letter, was that a constitutional application a valid restriction on the right to own and purchase firearms?

I'd like to sort of take -- while I know that we are going to do a separate briefing on the standing issue, I want to point out, though -- the standing, it's not about the constitutional right to sell firearms. The problem is we're in a regulated profession where there's only one way to buy a firearm. If you want one, you have to go through a Federally licensed firearms -- Federally -- Federal firearms licensee. And if that's the only avenue, and then you're telling, through statute, that you're not allowed to sell any firearms to anyone who has this card, well, you have essentially a prior restraint issue where those people are now completely shut off from their Second Amendment right, even though they were kind of kept out of the equation all together.

The -- the most important thing that we have to focus

on here is that we're not talking about someone who has been determined a user of medical marijuana, we're talking about somebody who has a card that, under state law, says they have a right to the use of the medical marijuana. And that's a huge distinction.

What the ATF is saying is that anyone who is a card carrying member of the medical marijuana party must automatically give up their Second Amendment rights. That they're not allowed to have a gun.

And as I say that, I realize, too, that there may be a real dire need to amend or maybe refile the case to include a First Amendment claim. Because really, that card is a form of political speech, and that's also reinforced by the cases that you have here in the State court determining that there's no real means of commercial access to medical marijuana, so it's very possible -- in fact, it's very likely -- that most people who have these cards aren't even users of medical marijuana because they have no means of accessing or of acquiring it. All the card says is that you have the right under state law to possess a certain amount and to grow the plant.

THE COURT: Okay. Well, if you are trying to add a First Amendment claim, that wouldn't be an issue on the Motion to Dismiss. The Motion to Dismiss essentially is looking at the face of the Complaint --

MR. RAINEY: Right.

THE COURT: -- what has actually been pled -- not what maybe you would have wanted to plead or might want to plead later or add -- but what is actually pled and whether or not any of those --

MR. RAINEY: Mm-hmm.

THE COURT: -- claims should be allowed to proceed, whether or not they are valid or invalid.

MR. RAINEY: Right, your Honor. But actually, also in --

THE COURT: So I'd stick to those. Maybe you'll amend later, and maybe --

MR. RAINEY: Right.

THE COURT: -- it'll be dismissed and you'll want to --

MR. RAINEY: I understand it, but I think that also I want to point out that it's really that -- that that cause of action comes out of their defense. Because what they're saying is, look, it's not a big deal. If you just get rid of the card, we'll let you buy a gun again. It's sort of saying, look, you get to either have the card or you get to have the gun, you don't get to have both. You -- that's where --

Because there's no actual restraint on speech at this point, it's just saying, you know, everybody's allowed to get the card, but they're saying that once you get it, you're not allowed to have any of these rights.

THE COURT: Okay. Well, this isn't what we're talking about the "they", "they", "they" without really being more specific. "They" is not Congress, this is not something that's been enacted by Congress --

MR. RAINEY: Right, by the ATF.

THE COURT: -- this is an ATF Open Letter.

MR. RAINEY: Mm-hmm.

THE COURT: So it either is a new rule that they are either enacting under the authority of Congress, in which case then you would, you know, consider it --

MR. RAINEY: Right.

THE COURT: -- just like a Congressional law, or is it just their interpretation of how they are going to be applying the law, in which case it is open to notice and comment and does have a different standard that's applied, it is a different kind of horse.

And so -- so I want to understand where it is that -- what it is that the Plaintiff thinks about this distinction, that it's not directly from Congress --

MR. RAINEY: Right.

THE COURT: -- we didn't actually have a bill that was proposed and passed --

MR. RAINEY: Mm-hmm.

THE COURT: -- and signed by the President, this is -- this is a rule.

MR. RAINEY: Right. Examining the constitutionally of the -- the constitutionality of the ATF Letter. And if we look at that through the lens of legislative versus interpretative, the -- and again, I reserve the right to brief on this more later because it was not properly briefed in the underlying pleadings -- but the fact is that the letter makes it very clear, you're not to sell firearms to anyone who has this card. Don't do it.

And if you're saying that, the ATF is essentially foreclosing any further notice or hearing as to whether or not these individuals are, in fact, illegal drug users. They're just saying we've made the decision, if you have the card, you're automatically deemed an illegal drug user. And as an automatically deemed illegal drug user, you're not entitled to a firearm and you can't sell that firearm to that person. And by making that --

THE COURT: But that wasn't necessarily the rule before the Open Letter was issued.

MR. RAINEY: No.

THE COURT: This is an interpretation analysis by an administrative agency of how it is going to react to the situation that it's faced with with what do we do about this scenario in these particular states where medical marijuana is allowed --

MR. RAINEY: Mm-hmm.

THE COURT: -- what do we want to do about it?

MR. RAINEY: Mm-hmm.

THE COURT: And they decide what they're going to do about it, how they interpret the law, and how it should apply.

MR. RAINEY: Sure. But it forecloses any further opportunity for these people to acquire a firearm.

And if you're a Federal firearms licensee and you read that letter, you know for a fact, I am now prohibited from making any further sales to these individuals. At that point you've cut off the Second Amendment rights of an entire class of individuals.

And you've said that this fundamental individual Second Amendment right is not -- is no longer offered to these people simply because they went and got a card.

Again, if you look at the other cases in which this law has been applied, and you look at those other cases, those are cases where people were convicted of criminal acts, cases where people were indicted for --

I mean, the Dugan case is a great example. The Dugan case, which by the way is only, what, two pages long and doesn't really give much analysis at all -- the Dugan case is about somebody who was running, essentially, a drug ring out of their apartment and an illegal firearms business.

Where here, we're talking about a woman who went to her physician, got a med -- got a prescription, essentially,

for medical marijuana, went to the Government and got a State-issued card, and now says, just because you got that card, you can't own a gun.

That's -- it's a completely night and day example. And it also underscores the fact that we also believe that this Court does have the --

THE COURT: Well, and I do empathize with the situation that she finds herself in. There are plenty of legal, prescribed medications that may or may not be much more dangerous --

MR. RAINEY: Mm-hmm.

THE COURT: -- than marijuana as far as the scientific world has told us, and what they know about drugs and drug uses and the effects. You know, morphine comes to mind. That's something that's prescribed for pain, and I'm told will essentially kill you if you take it for too long, right?

But, you know, that's -- that doesn't necessarily negate someone's possession of a gun so long as there's no other -- you know, if they're taking it, obviously, for a mental illness, or if they're a felon, or so forth, then there could be other problems.

So I completely sympathize with the situation, and so don't want that to be lost on Miss Wilson, but this is a matter of -- of, not facts, but rather a matter of law, and so we do need to have -- keep that in mind that we look through the --

the recent law and any of the precedent that we have for guidance --

MR. RAINEY: Mm-hmm.

THE COURT: -- and not just act out of sympathy --

MR. RAINEY: No.

THE COURT: -- but rather try to be logical about this. So I think that your stronger argument is probably as to this ATF Open Letter.

MR. RAINEY: Oh, and I agree with that, Your Honor, and we don't question that. We think that the ATF Letter -- that we have a much stronger argument there, and it's a very uphill battle to argue the unconstitutionality of the statute.

But I also think that Dugan doesn't really deal with this situation and it's not really on point. It definitely discusses the statute as applied in that context, but I just don't think that -- and while it does say that the Government has a right -- sort of omnibus right to restrict Second Amendment rights to dangerous people, it doesn't deal with this situation, and it's not directly on point here.

And when you start taking the, sort of, broad interpretation that the ATF has taken of the statute, and you start seeing how it kind of gets wider and wider as you go from the -- the regulations -- when you go from the statute to the regulations to the letter, it sort of becomes this -- this giant Pacman that envelopes all of us, where we're suddenly --

the Second Amendment rights are deprived from just an enormous cross-section of people.

And I -- I think that's something that has to be entertained by the courts and dealt with.

And when you look at all of these cases that are cited -- and I could read them off here -- I mean, you go through, you know, United States versus Marzzarella in the Third Circuit. Again, indicted for possession of firearm with an obliterated serial number in violation of 922(k).

You have Huddleston v United States which is a previously convicted felon. You have U.S. v Reese in the 10th Circuit, criminally charged with possessing firearms while subject to Domestic Protection Order. They're just -- they're all way outside the scope of this.

Here we're saying it's a prior restraint before there's been any notice, any hearing onto whether that individual has been an illegal user.

And that's where our procedural due process claim comes in, too, is that you're saying, if you're going to deny them the right, you have to have some sort of notice and hearing to say you are deemed an illegal user. You can't just say we think you're an illegal user. And as -- because we think that, we're now going to deprive you -- before any sort of hearing or anything -- we're going to deprive you of that right.

Now, I know the day sort of --

THE COURT: Well, what the letter specifically says is that if a seller believes, you know, knows, or has reasonable to believe --

MR. RAINEY: Right.

THE COURT: -- that she's a cardholder -- and this was kind of a unique situation where the seller wasn't someone who was unknown to Miss Wilson, they actually knew each other, and so he was aware that she was -- that she did have a card for medical marijuana -- I don't think there's a question as to whether or not she actually possesses marijuana, it's just the possession of the card --

MR. RAINEY: Right.

THE COURT: -- at this point --

MR. RAINEY: Right.

THE COURT: -- and maybe that's an issue that's --

MR. RAINEY: Mm-hmm.

THE COURT: -- more important and shouldn't be overlooked than the fact of, you know, whether or not she actually possesses marijuana, she only possesses the card at this point.

MR. RAINEY: And I don't think this is a unique situation. I mean, Miss -- Miss Wilson is, in fact, I mean, a medical marijuana advocate. I mean, she's someone who's been politically active in the movement to get more broad medical

access for patients, she works -- she's worked in the medical profession, she believes that the treatment is helpful to people with various ailments from cancer, to HIV, and other conditions.

But she -- and so her presence within the community, just like anybody else who happens to be a medical marijuana activist who is carrying these cards, those people would be known if they went to buy a firearm probably within their community in the same context. I mean, we're talking about a small community in rural Nevada where everybody knows everybody. And so I don't think it's that unique a situation.

Moreover, I think where this issue came to light through the ATF, and why the ATF felt -- I guess, the reason they wanted to pass this rule was because people were using -- because when you see the state-issued cards, they look just like driver's licenses. I mean, they're state-issued. And so people would pull them out and use them as identification.

THE COURT: So it sounds like you're going beyond the rule here that is the inference. I took it to mean that the real concern here was not necessarily whether or not she possesses marijuana or whether she intends to possess marijuana and a gun both together at the same time, but the fact that there's an inference being made by the ATF Letter that, just because she is a card carrying member or has a card -- I guess not a membership -- but carries a card, that that alone allows

an inference that she, in fact, is going to possess marijuana, much like someone who might be an advocate for Pro Life --

MR. RAINEY: Mm-hmm.

THE COURT: -- and, you know, doesn't think that abortions should be illegal. Because, I mean, that person has to be getting an abortion, or has got an abortion, or ever is going to -- it could be a man. You know? It could be anybody --

MR. RAINEY: Absolutely.

THE COURT: -- that's -- that's -- so the fact that she has a medical marijuana card, I don't know whether that's maybe the stronger argument here is that it's the interpretation that's being given by the ATF Letter that -- the authority to the seller to make an inference --

MR. RAINEY: Mm-hmm.

THE COURT: -- that she possesses marijuana. And even if you were to admit that, were she actually to possess marijuana and a gun, that perhaps that would be a different situation, a different argument for another day. But today's argument --

MR. RAINEY: Mm-hmm.

THE COURT: -- is that the inference itself, that just because she has the card necessarily is, you know, proof positive sufficient for a seller to determine that they are not allowed to legally sell a gun to her.

MR. RAINEY: Right. And, Your Honor, I think that goes back to, if you look at the typical application of these 922 statutes, it's usually in the context of a criminal case where someone's already been found guilty or is being prosecuted for, you know, possession of illegal drugs, you know, we found in his car a kilo of cocaine under the passenger's seat and the gun in the glove box, and they're saying, ah-ha, now I've got an extra charge to throw at him because he's not allowed to have that gun if he's got the cocaine. And so that's usually the context in which we see these cases.

What I think has happened here, and what our argument, is that the ATF has made a politically motivated statement against an entire political movement, and has basically tried deliberately to tweak the law to target this group and start depriving rights.

And, of course, outside the scope of this case, there are other issues where they've done similar -- similar acts, but we're focused here just on the Second Amendment violation.

And what's happened is they're saying -- they're using 922 for the purpose of targeting the medical marijuana law --

THE COURT: I'm not inclined to find that because someone is a marijuana user, regardless whether they have a card or not, that they are allowed to have a gun, when under Federal law marijuana is still illegal.

MR. RAINEY: That's -- and that's not the --
THE COURT: So I'm just probably not going to go there --
MR. RAINEY: Right. And that's --
THE COURT: -- is what I'm telling you as far as wisely using your time.
However, the fact that she has -- there's no proof to the seller that she actually possesses marijuana other than that she has the medical marijuana card. But the ATF is telling the seller that's enough.
MR. RAINEY: That's right.
THE COURT: So I think that maybe is more of a concern to the community as far as whether this is overreaching and being applied incorrectly or improperly as opposed to if the seller was to walk -- you know, if she was to walk in to buy a firearm, and she had, you know, a bag of marijuana in one hand --
MR. RAINEY: Right.
THE COURT: -- and the money to pay for the firearm in the other, that would be different, and I think that's something that probably you don't want to argue today --
MR. RAINEY: No, that's not something I want to argue today.
THE COURT: -- because I don't think you're going to win on that argument. Here we don't know for a fact that she

has --

MR. RAINEY: Mm-hmm.

THE COURT: -- any marijuana or -- and I think that's probably your better argument.

MR. RAINEY: Right. And then when we get to the equal protection argument, the argument there also deals with the card saying that, like, well, in states where they don't require a registry card, those people can just walk in and buy a gun even if they are smoking weed, if they are chronic, addicted users, if it is -- you know, there's medical opinion that says you can't be addicted -- but that aside, even if you had someone who was regularly smoking marijuana and is openly smoking marijuana in that state, they could just walk in and they don't even have the card. And so the Federal firearms licensee doesn't even have to take that into consideration.

Whereas, a similarly-situated person in the State of Nevada, where you have a state-issued driver's license looking card, that person is denied a Federal firearms licensee -- Federal firearms purchase if they -- just because of the fact that they have the card.

THE COURT: Okay. So you were advocating the standard of strict scrutiny.

MR. RAINEY: Yes.

THE COURT: So let's assume for a moment that the Government is correct --

MR. RAINEY: Mm-hmm.

THE COURT: -- when they argue that intermediate scrutiny should actually apply.

MR. RAINEY: Mm-hmm.

THE COURT: How -- and so they must show that the regulation is substantially related to an important Governmental objective.

MR. RAINEY: Right.

THE COURT: So how does this regulation not pass muster?

MR. RAINEY: Well, first of all, I wanted to point out that the -- what the -- what the Circuit Court -- just as a preliminary -- what the Circuit Courts have been saying, really, is -- at least in that Seventh Court -- I think it's the Seventh Circuit is the first, I think, to deal with this, I could be wrong -- but what they are saying, sort of, is there's this two-prong test, right? One is, is there a constitutional -- is there a Second Amendment right being deprived -- which I think in this case is pretty straightforward, it's a gun, you're not allowed to have it -- but the second prong is, depending upon the level of the deprivation, what level of scrutiny we apply and the extent to which -- it was sort of this weird sliding scale that I believe was presented in Ezell v City of Chicago? Is that correct? I apologize if I'm mispronouncing that.

But it -- but the -- if we were to apply intermediate scrutiny -- because I recognize that, even though the Ninth Circuit has this, sort of, strange opinion on En Banc, that most of the courts have adopted an intermediate scrutiny standard -- if we're applying that, again, it goes back to the card versus the usage.

They're saying, if you have a card, you're automatically a user. There's no -- it's not substantially related to any Government purpose at that point. We're just saying anybody who happens to have a medical condition where their doctor has advised them to do this must be denied a gun.

And -- and, I mean, at that point, too, I mean, you've probably got people within this context who just go out, see their doctor, and have no inclination towards smoking marijuana or breaking the law. And the doctor says, you know what? I recommended this treatment for you. And they go and go through the process of getting the card, and we're now going to say, well, you don't get a gun because your doctor made that recommendation. There's no -- there's not even a rational basis connection there. It's just sort of saying this is -- it's comparing apples and bullets. It just doesn't make any sense.

THE COURT: So is having a medical marijuana card substantially related -- well, I guess the question is -- is having a medical marijuana card -- and -- is having a medical

marijuana card essentially the same as being an unlawful user?

Is having a medical marijuana card substantially related to the Governmental objective, the very important Governmental objective, of prohibiting weapons from individuals who may not be of the best judgment in order to exercise control of such a dangerous weapon --

MR. RAINEY: Right.

THE COURT: -- or is it to attenuate it? Is having the card alone to attenuate it and not the same as possessing the actual marijuana?

MR. RAINEY: Right. And I think there we have to look at the policy purpose that is adherent to -- I'm sorry -- inherent to the 922 statutes. And the idea there is being like someone who is addicted to a controlled substance has -- doesn't have the ability to judge right from wrong, I guess, because they're under the throws of the substance, and then those who are illegal users of a substance, I think the argument there --

THE COURT: Well, there's public safety --

MR. RAINEY: Right.

THE COURT: -- and you want to prohibit crime --

MR. RAINEY: Right.

THE COURT: -- that's violent from -- from --

MR. RAINEY: Right. But to get there you have to make a connection between unlawful use and violent crime and all of

these other ills that could be inflicted on society. And I think in order to get there you say, well, this person's already breaking the law so they're gonna -- they're liable to break the law in other ways.

You say that this person is under the influence of the substance, so they're liable to break the law because of the substance.

And so I think in this context you have to look at it and say, well, but if we're talking about patients who have been advised by their physicians to do it -- this specific course of treatment -- those aren't -- those aren't law breakers, these are people that are doing what their physician tells them to do. These are people that are even going the extra step and following the State-implemented Government system to get the appropriate card to follow that treatment.

Now, if they -- if they don't follow the treatment afterwards, if they ultimately decide, you know what, I just don't want to do that, I don't want to break the law at that point -- but they haven't broken the law in any way up to the point of application for the card.

THE COURT: But they haven't broken State law, but they have violated Federal law. That's the issue here is that Heller is saying that there are limitations and --

MR. RAINEY: Right.

THE COURT: -- when someone is breaking the law, then

they're an unlawful user as opposed to a lawful user. So I realize --

MR. RAINEY: Right, but there is --

THE COURT: -- the State law hasn't been broken, but the Federal law, you have to admit, has been broken.

MR. RAINEY: No. There's no Federal law that says you can't get the card. The Federal law doesn't say that. The Federal law says you can't use marijuana, you can't possess marijuana, and it doesn't say you can't get the card.

So if we have, an example, a cancer patient who's told by their physician --

THE COURT: So again, the issue here really is the ATF's interpretation of -- and let me go back and read the -- the actual language of the statute here in issue.

It starts off essentially with the 922(g)(3) portion which is, "It's unlawful for a user of controlled substances to possess firearms." So it's an unlawful user of controlled substance.

MR. RAINEY: Yes.

THE COURT: And then the 922(d)(3) is where it "prohibits the firearm seller who knows or has reason to believe that the person is an unlawful user".

So where the ATF Letter says that, "evidence of a recent use or possession of a controlled substance or pattern" -- I'm sorry -- going back to the definition of

unlawful use is one -- "An inference can occur and can be drawn from evidence of a recent use or possession of a controlled substance, or a pattern of using or possessing that reasonably covers..."

So it's actually an inference within an inference at this point --

MR. RAINEY: Mm-hmm, yes.

THE COURT: -- so it's actually a double inference. So the inferences that if there is a pattern of use or possession, that that could constitute unlawful use, and then the inference as to whether that applies is the Open Letter from the ATF that, "possession of the marijuana card constitutes reasonable cause to believe that the buyer is an unlawful user."

MR. RAINEY: Mm-hmm. It's really, Your Honor, in that one sentence on the letter, if you read it, it says, "Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have reasonable cause to believe that the person is an unlawful user of a controlled substance."

And it says prior to that that if you have that reason to believe, you are not to sell them a gun.

THE COURT: Okay. So under intermediate scrutiny, I think we agree that there is an important Governmental objective. The question is whether or not, when this

particular new rule that's issued under the letter is substantially related to that important objective, or is it to attenuate it?

MR. RAINEY: Hmm.

THE COURT: Would you --

MR. RAINEY: That's exact --

THE COURT: -- agree with that --

MR. RAINEY: Yeah.

THE COURT: -- being your position?

MR. RAINEY: That is correct, Your Honor. Now, as I say that, I don't waive the arguments that if she's --

THE COURT: I know you want me to reach further, but I don't think it's gonna happen.

MR. RAINEY: Right. But I also say that that is our -- that is our initial proposition is that you can't just say that this card is -- is -- you know, is itself justification.

And I think that that concludes our argument here. If you have any further questions --

THE COURT: And you want to reserve the right to argue standing as well; is that right?

MR. RAINEY: Yes, yes, I do want to -- right.

THE COURT: Let's see what else I have here. All right. So we'll allow the parties both to brief the effects of the Nordyke En Banc decision as well as the standing issue.

Let's see if there was something else. I have somewhat of a question about the Court's jurisdiction. I'm not sure that I've worked myself through it yet --

MR. RAINEY: Mm-hmm.

THE COURT: -- in regards to the fact that she hasn't actually been charged under this statute criminally.

MR. RAINEY: Mm-hmm.

THE COURT: It is more of an issue of her being prevented from obtaining the firearm.

But with the understanding that if she were to obtain the firearm --

MR. RAINEY: Mm-hmm.

THE COURT: -- then the Government's position very clearly in regards to the Open Letter is that she would be charged -- or, of course, they have discretion -- prosecutorial discretion -- to decide whether or not to use their funding and their resources and things on --

MR. RAINEY: Right.

THE COURT: -- an individual such as Miss Wilson, or whether they would prefer to use it --

MR. RAINEY: Yeah. And, Your Honor --

THE COURT: -- on other individuals. So I'm not sure whether that jurisdictional question is one that is controlling. But even if you all don't bring it up, that's the Court's duty is to look at jurisdiction. I'm reminded of the

case that went all the way up to the Supreme Court --

MR. RAINEY: Right.

THE COURT: -- many years after the case had been filed, and when it got there, one of the first things the Supreme Court said is this was never a Federal question. There's no jurisdiction here.

So I definitely don't want to waste your time, if that's the case, if I don't even have jurisdiction. But, like I said, I'm not sure that I've worked myself through that yet.

MR. RAINEY: Right.

THE COURT: Is there anything else that you want to add?

MR. RAINEY: You know, and Your Honor, actually, on that point, and I want to point out that I recognize that procedurally what we did as Plaintiffs was a little unorthodox in a Cross-Motion for Summary Judgment, and maybe we were rushing a bit to get this going. But at the same time, there -- there are clearly issues that you've brought up that were not raised in the underlying briefs that need to be addressed. And the issue of standing being one of them.

The way we interpret, really, the issue of the fact that she hasn't been charged, the fact that she's been deprived of the firearm in the same fashion of the prior restraint case in speech -- the free speech case, it's like saying you're not allowed to even speak on this matter, it's very similar in that

sense.

And while they have sort of -- the opposing side has made some hay of how we applied First Amendment doctrine, it's clear since D.C. v Heller, when you start looking at these Circuit Court opinions, that they're really starting to apply principles that are borrowed from First Amendment case -- case law.

And I think the idea of the Government being able to shut down a person's right to ever acquire a firearm legally is, in and of itself, a violation of that constitutional individual right to own and possess a firearm.

So thank you.

THE COURT: And you said you were kind of in a hurry to get -- to get this filed. So is there some Statute of Limitations that's -- that's --

MR. RAINEY: No, no, Your Honor.

THE COURT: -- an issue or --

MR. RAINEY: I think we -- we were pretty targeted in the way that we pled the case. And I -- looking back now, I think all these issues being raised, I'm thinking maybe we should have just done an opposition to their Motion to Dismiss, and allow more discovery, and kind of move through the case in normal channels rather than do a Cross-Motion for Summary Judgment. Because there are issues that, as you sort of -- with any constitutional thing -- as you sort of pull at the --

the string of the sweater, you start seeing more and more items that you have to address.

And the 20 -- what is it -- the 30-page limitation on a motion that's -- doesn't really give us enough time to properly vent all these issues. So, thank you.

THE COURT: All right. Thank you. Mr. Theis?

MR. THEIS: Thank you, Your Honor. Several points I'd like to address.

First, I'd like to try to bring us back to the controlling law and the Complaint that's before the Court, because there are several policy arguments and discussions about amending the Complaint, and I'd like to focus very clearly about what the issues are here and what was pled in the Complaint.

What we have here is a -- is a clear understanding of -- a question about what is this inference that a seller who is selling firearms can make about someone's unlawful drug use. That seemed to be something the Court was concerned about.

And I think what is clear here is, the Plaintiff is the master of the Complaint, and she's pled several facts that show that she is or intends to violate the law, violate Federal law.

As the Court repeatedly said, marijuana is against the law under Federal law. So when Plaintiff argues that this is -- you know, she's not violating the law, if someone is an

unlawful user, they are violating Federal law, even if it's for medical purposes under State law.

So what we have here is, if someone possesses a card, there is -- that specifically allows them to use marijuana under State law, the logical inference is that they are, in fact, going to use that card and use marijuana. So that is a completely logical inference for a seller to make.

In addition to the plain fact of that, the factual pieces, what she's alleged in her Complaint make clear that she had to go through several steps to aver to the State of Nevada that she intended to and was going to use marijuana.

Those facts include she had to go -- under the statute you're required to go to a physician, the physician is required to diagnose you with one of the various conditions that are -- by statute that you can have that allows you to use marijuana for medical purposes under State law.

And in particular, the physician also has to warn the individual about the deleterious effects of marijuana, there has to be -- the disease itself has to be chronic and debilitating, and there has to be a clear understanding that, whatever -- the use of marijuana would somehow mitigate the conditions.

And so the Plaintiff then had to take that documentation and submit it to the State in order to say, I'm going to use marijuana to alleviate the symptoms of the

condition that I have.

Taking those two pieces together, it's clear, this is not an unreasonable inference that a person who does that, who goes through those steps to say, I'm going to use marijuana, does, in fact, use marijuana.

And again, there's two different -- there's a temporal scope to this. Every year you have to renew your license. You have to go back to the State of Nevada and submit more documentation from your physician saying, my physician is telling me I need to continue to use marijuana, and that's, in fact, what she did, and that's what's alleged in the Complaint.

So there's no allegation about, you know, these other pieces or questions about why she got the card or the purpose for getting the card, that's not in the Complaint. What's in the Complaint is that she wanted to use marijuana, she got a card, told the State of Nevada she was going to use marijuana, and then was prohibited from purchasing a firearm because of the possession of the card.

So that -- I feel like the logic and the facts in the Complaint get to that inference question that the Court is concerned about.

And again, under (d)(3), it's just that someone needs to have reasonable cause -- seller needs to have reasonable cause to believe. All of these facts show that that was entirely reasonable for someone to believe that she was an

unlawful user.

I also second wanted to address this -- the independent constitutional analysis. The two steps got a little bit blurred here and how we were discussing this.

The second -- the first step is not whether or not this case generally involves the Second Amendment, but the question is whether or not the restriction at issue here falls within the scope or is within the historical understanding of a type of restriction that the Second Amendment allows.

And we've cited a variety of sources in our briefs that point to the understanding of the Second Amendment right, as Heller described it, as reserved for law abiding, responsible citizens. That's the core right of the Second Amendment.

So for individuals who are not law abiding, who are not responsible citizens, who affirmatively tell the State of Nevada that they're going to violate Federal law, the Second Amendment does not apply to them.

So that is -- you don't even need to get to the scrutiny position. The restriction under the analysis of the Second Amendment, it does not apply to those individuals.

Second, for the scrutiny piece, we want to make -- and I would just point out on that specific point, Plaintiff doesn't, in her briefs at least, challenge that assertion. She doesn't suggest that somehow the Second Amendment didn't

include, well, but if people have an exemption for medical marijuana or medical drug use or somehow had some other exemptions for violating the law, that that would be fine. That's not in the briefs.

All that they say is that she doesn't violate State law. But again, there is no such thing as a lawful marijuana user under Federal law.

THE COURT: So --

MR. THEIS: Yes.

THE COURT: -- what would be the Governmental objectives that are important and at issue here under strict scrutiny?

MR. THEIS: The Court -- in 922(d)(3), as in all of the Gun Control Act from 1968, the Government objective was to ensure that criminals do not possess firearms. To make sure that -- there was an interest in protecting public safety.

And every Court -- that's a compelling interest. That's beyond -- this is a very substantial interest that the Government has.

And 922(g)(3) references the Controlled Substances Act in order to determine what type of drugs and what qualifies as legal and not legal.

And that -- within the Controlled Substances Act is various schedules. Under Schedule I, marijuana has been on Schedule I since the beginning. It's clear that what -- from

the initial putting of marijuana on Schedule I to the continued rejections of the petitions to the Attorney General and to HHS to remove marijuana from Schedule I, that there's a continuing judgment by the Federal Government, by the Attorney General, by HHS, that there is no medical use for marijuana, one, that individuals who use marijuana, as the Duty Court recognized, are more likely to have -- lack self-control.

And in addition, there's the pharmacological or other deleterious effects that are -- we point out in our briefs, that someone who is under the influence might more likely engage in activities that would tie back to that violent crime.

So that -- that's the fit that we're -- we're looking for in that intermediate scrutiny analysis is between those two different pieces. So I think that answers the Government's question -- or the Court's question about that particular question.

THE COURT: Well, the earlier cases that the Plaintiff was referring to were the criminal cases where someone's actually been charged with a criminal offense. We don't have that here. In those cases, intermediate scrutiny was applied.

This is a different case in that she has not yet been charged with a criminal offense because it's more of a -- of a -- like he was saying -- perhaps a prior restraint or, not to use a legal word, but at least she has been prevented from committing what, in the Government's eyes, would be perhaps a

criminal offense.

So how does that affect the standard that I should apply, or does it?

MR. THEIS: Well, Your Honor, it's -- it supports the argument that this is -- that there's no constitutional violation here.

In criminal cases, the burden is squarely on the Government. And it's a substantial burden, it's beyond a reasonable doubt. There has to be a wide variety of facts that are submitted that a finder of fact has to determine beyond a reasonable doubt that that person committed this crime.

This is a civil pre-enforcement challenge. The only burden that's relevant here is whether or not a constitutional -- a statute, or regulation, or the letter violates some provision of the constitution.

And she has put forth in her complaint, she's averred to this Court and to the State of Nevada that she is -- falls -- she is violating the law. And that -- that -- so that's -- there's no question here about -- you know, there hasn't been a full hearing about whether or not she's an unlawful user. You don't need to do that because this is -- she's the master of her Complaint and she's pled facts that show that she is an unlawful user and violates Federal law.

THE COURT: Well, isn't that the question? I don't think that she's alleged she's an unlawful user. If anything,

she's alleged that she's not an unlawful user. What she's alleged is that she has the medical marijuana card issued by the State. She hasn't admitted that she has any marijuana, or even that she plans to possess any marijuana.

I realize that's the inference that the Government is asking the seller to make and, likewise, asking the Court to make now, but I don't think that the Plaintiff has admitted that that inference is correct. In fact, that's why we're here is to determine whether or not, as you say, it is a logical inference or is it not.

MR. THEIS: Well, and I would again go back to those two points. That if someone has a card that says you can use marijuana, the inference is that they are using marijuana. If someone tells the State of Nevada I'm going to use Nevada -- I need to use marijuana in order to alleviate a condition that I have under State law, if I -- if this person goes to the doctor and says, I want to use marijuana, and the doctor prescribes something that's submitted to the State of Nevada, all of those -- those facts build to a very reasonable inference that someone is violating Federal law.

THE COURT: So you're saying, in the application process to get the medical marijuana card, that she has to aver, or sign, or in some way admit or declare that she plans to use marijuana?

MR. THEIS: Well, what the statute says is that you

need to have valid, written documentation from the physician stating that, one, they've been diagnosed with a chronic and debilitating medical condition, two, that the use of marijuana may mitigate the symptoms and, three, that the attending physician has explained the risks and benefits of the medical use. That's --

THE COURT: So she's not declaring she's going to --

MR. THEIS: Well, there's no other inference that can be drawn from that. If she submits -- she goes to her doctor and asks, I have a debilitating condition, is marijuana something I can use? And the doctor says yes, and here are the problems with using marijuana, here's this information, submit it to the State, that's -- that's a pretty reasonable inference to say that all of that leads to that one intends to use marijuana to alleviate those conditions. And that's -- that's -- you know --

THE COURT: Are you aware -- and I realize you're from D.C. so maybe you're not -- but in your research, have you determined how long it takes to go through that process of obtaining the medical marijuana card here?

MR. THEIS: I don't, Your Honor. I know that in this particular case, I believe it was several months that she -- between the actual submission of the application to the time that she received her -- and that it was a few months after that that she then attempted to purchase the firearm in this

case.

THE COURT: So the likelihood that she might be doing this, getting the card just in case this -- whatever illness she has becomes intolerable enough that she needs the marijuana, that she's getting the card now before it's -- it's too late, is that something that I should consider, or not?

MR. THEIS: I don't think so, Your Honor. Because the statute makes clear that this is something that's about chronic or debilitating condition.

THE COURT: I mean, if her doctor told her, look, this is only gonna get worse, it's not gonna get better. I can give you medications. They're not -- they'll work at first but they're not going to work long-term, and eventually, you're going to need something else, do you want me to write you a prescription for this? And she says, well, I don't know. And he says, it's going to take you about seven months to get the medical marijuana card so you may want to go ahead and do it now just in case?

I mean, sometimes I go to the doctor, and the doctor will give me a prescription for my son's sore throat and says, if it doesn't get better in a few days, get the prescription filled. Doesn't mean I'm gonna. I'm gonna wait and see if that sore throat gets better on its own. But if it doesn't, I'm gonna get the prescription filled.

So is that the scenario -- you know, if that is a

scenario we have here, can I even assume that? Does it matter? Should I just confine myself to the fact that she got the card regardless of how long it took to get the card?

MR. THEIS: I think that's correct, your Honor. Respectfully, all of those suggestions are not before -- this is not pled in the Complaint. What's pled in the Complaint is she went to a physician, she got the -- submitted the paperwork to the State and got the card.

There's nothing to suggest that she's -- nothing to suggest that she's not using marijuana for any particular purposes, nothing to suggest that she stopped using marijuana the day she got the card. All of -- all that we have is what, again, in the Complaint. And what is in the Complaint is enough to dismiss the case because there's nothing there that -- that would give her some sort of relief.

I would -- a couple of different just quick points that we talked about that were also raised. The equal protection thing, I'll just very briefly address this.

There's this question about whether or not, so the State of Nevada is a registered card, but other states -- that also have recognized medical marijuana under State law, but those states don't, you know, formally have registry cards, and that therefore, they're somehow being treated differently.

What that claim really boils down to is that individuals in the State of Nevada, it's more -- it's more

difficult for them to evade the law than other states. Meaning you still have to fill out a form and submit it to the ATF -- or submit it to the firearm seller when you're at the firearm licensee. The question is, are you an unlawful user of drugs, that you have to answer yes or no.

And if someone doesn't have a medical marijuana -- they're supposed -- if they are an unlawful user of marijuana, meaning if they use marijuana at all under Federal law, they're required to answer yes to that. But that doesn't -- just because there's two different ways in which the seller can look to -- there's two different ways in which the seller can make the judgment about whether or not the person is an unlawful user of marijuana, but that doesn't create an equal protection claim. They're treated equally, same. Two -- the Federal law applies equally to both of those categories and individuals.

THE COURT: Did she fill out the form -- the application form, and did she indicate on the application form that she was a marijuana user?

MR. THEIS: She left that question blank. And I believe in her Complaint she stated she didn't --

THE COURT: So on that basis alone the seller could --

MR. THEIS: Absolutely.

THE COURT: -- deny her the firearm because --

MR. THEIS: That's correct.

THE COURT: -- it's an incomplete application, no?

MR. THEIS: That's correct.

THE COURT: She might have to apply again and actually indicate on that application and have a successful application before we get to this legal issue, it appears. I -- I have to think about that.

MR. THEIS: That's correct, your Honor. And that is certainly -- you know, if she -- that's correct. That is another grounds or cause to dismiss this present Complaint.

THE COURT: With leave to amend, perhaps.

MR. RAINEY: If I may really quickly, Your Honor, on that point? If you read the Complaint, it actually says that she went to fill out the question, and she was stopped by Mr. Houser, and he testified that he stopped her from answering the question saying, "You have to answer this yes because I know you have that card." And that was -- that's why she didn't fill it out.

THE COURT: But he hasn't testified because we had -- this is the first hearing I've had on this case --

MR. RAINEY: His -- his --

THE COURT: -- but he's got an Affidavit or a declaration.

MR. RAINEY: It's attached to the Complaint, yeah. And it includes -- and it actually cites -- and so is the application. And he specifically says that, "I told her not to fill that out because I knew that she was an unlawful user

because she had a card."

THE COURT: Okay. So not only is she prevented from having a firearm, she's prevented from even applying for the firearm.

MR. RAINEY: Essentially, yes.

MR. THEIS: That's -- that's not correct, Your Honor. She could still --

THE COURT: That's not what the ATF, I think, intends, but perhaps it is. I don't know.

MR. THEIS: Well, no, no. She can still -- she can still apply for the -- for the -- for a firearm, absolutely. There's -- but until she is --

THE COURT: That's not what the seller understood the letter to say.

MR. THEIS: But the seller -- what the sell -- again, I want -- to go back to --

THE COURT: So was that a misunderstanding? Should the seller have allowed her to at least complete the application and then make the determination whether or not to approve it?

MR. THEIS: Congress has determined -- and this is the language of (d)(3) -- that, "Any person that the seller knows or has reasonable cause to believe is an unlawful user of a controlled substance, they can deny that person a firearm."

But they have almost -- they have wide, wide authority

to do so. And so the question of whether or not she -- you know, she -- he stopped her from answering that question or whether -- that doesn't matter to the -- to the question before the Court, and that is, does that statute, which says you can use reasonable inferences to determine whether or not someone is an unlawful user, that that's all that -- that matters for this case.

And so, you know, the fact that -- because this particular seller could use a wide variety of inferences to determine whether or not the person has a reasonable cause to believe that they're an unlawful -- that they're violating Federal law by using marijuana.

And sellers, in fact, do that. There's -- they can do a wide -- they can make any sort of determinations they want in that purchase process regarding this particular issue.

I want to just get back -- briefly back, again, to this -- there's this question about -- you know, the Court suggested that there's -- that somehow, because she is using marijuana for medical purposes, or that individuals who use the card -- or have the card use the marijuana for medical purposes, that that's somehow different than other types of marijuana users.

And I just want to drive home again that the Federal Government is not taking that position. The policy, based on years of determinations and analysis of this, is the Federal

Government looks at marijuana use as exactly the same no matter how one uses it or when one uses it.

And so -- but there's no diff -- all of the questions about, well, she's somehow different, that's something that she's welcome to petition Congress about and ask can we change the law and -- or go to the Attorney General or the DEA and say, move marijuana from Schedule I, but that's not the case here.

All -- what has -- what has been the standing policy is that marijuana cannot be used no matter what the case, even marijuana for medical purposes.

So that's what -- I want to keep focusing in on that particular issue because there's no distinguishing fact between these two types of users of marijuana.

THE COURT: So this medical marijuana card is only good for a year, right?

MR. THEIS: That's correct.

THE COURT: And has to be renewed. So if hers expires, she doesn't renew it, she goes to the seller, she gets a firearm, and the next day she reapplies for the medical marijuana card, then she wouldn't be afoul of the seller's -- the seller wouldn't necessarily be in trouble, he wouldn't be charged under the Gun Control Act for having sold a firearm, but she would still be in the position of both possessing the card and the firearm. So you're saying then she would still be

subject to conviction?

MR. THEIS: So in your hypothetical, the card has expired --

THE COURT: Mm-hmm.

MR. THEIS: -- she no longer has the card, but she goes and tries to purchase the firearm and is denied --

THE COURT: No, no.

MR. THEIS: -- or is not denied --

THE COURT: Not denied.

MR. THEIS: -- she gets the firearm.

THE COURT: She gets the gun, yeah.

MR. THEIS: So for the two different issues here. The first one is, on the seller's part, all that is incumbent upon the seller is to determine whether or not there's a reasonable basis to believe they're an unlawful user.

And hypothetically, you have the -- I don't -- there's nothing that would suggest immediately, from the seller's point of view, this person is a user of marijuana. So that there's nothing -- there's no issue there.

The question -- whether -- the second -- to your second question about the former holder of the card. All that matters is whether --

THE COURT: So if she was to do it in the reverse, she gets the gun first, then she applies for the medical marijuana card, but she at some point has both the medical marijuana card

and a firearm. So is that the ATF's Open Letter's position that now she is in violation of -- because she is an unlawful user with a firearm?

MR. THEIS: Well --

THE COURT: Because the inference is that she is an unlawful user if she has the medical marijuana card.

MR. THEIS: I want to go back to the text of the letter. All that the letter is saying is -- first of all, the letter -- the vast majority of the letter, all that it does is restate the law. It says this is what (d)(3) says. You know this. This is what the regulation says. You know this.

THE COURT: Right. It's addressed to the seller.

MR. THEIS: And it's addressed to the seller, and it specifically says, any piece of information that you have that you can use is the possession of this card. And if you know that they have possession of a medical marijuana card, that that's a piece of evidence that you can use to not allow them to possess a firearm.

So -- so that that -- that's all that we're focused on as far as the letter is concerned. The letter is not prescriptively giving any guidance to the Department of Justice or to the public at large about who they're going to prosecute based on possessions of a -- if you have -- if you're --

THE COURT: But the purpose of the letter is to satisfy the important Governmental interest, which is to

provide safety and prevent violent crimes --

MR. THEIS: Correct.

THE COURT: -- and prevent individuals who have both firearms and a medical marijuana card from possessing both at the same time. A valid medical marijuana card, not an expired one. A valid medical marijuana card.

So if you can prevent someone from getting the gun, the reason that you want to prevent them from getting the gun is because, if they do get the gun, the Government believes that they will have violated the statute by being an unlawful user in possession, right?

MR. THEIS: I think those are two different analyses. The first is what the letter addresses, and that's only the point of sale. And that is the focus of the letter, and that letter is fleshing out the -- how to deal with this -- this language in (d)(3) that you have a reasonable cause to believe they're violating the Federal law.

THE COURT: And the letter doesn't address or even intend to address the (g)(3) --

MR. THEIS: Right. Exactly. That's not the point --

THE COURT: -- language. Okay.

MR. THEIS: -- is that that's a separate analysis. Is if someone is violating (g)(3), you look to whether or not they're an unlawful user of a controlled substance. And that's -- that's clear. If you're possessing a gun at the same

time that you're an unlawful user of a controlled substance, then that -- that you fall within that category.

Now, I'm not hyp -- you know, making a hypothetical about this particular Plaintiff, but in the hypothetical that you set out. That's -- that's what --

THE COURT: Right. But you're saying the purpose of advising the seller about what -- how they interpret the language of (g)(3) is so that the seller doesn't inadvertently enable a person from violating the -- the other subsection. So I'm --

MR. THEIS: Yes. It could be read that way, but I think it's clearly focused on the seller's own concerns.

And what animated this, obviously, was seller is saying there are now these states that have passed marijuana laws that exempt one from prosecution. So what do we do with that fact? And so that's what this -- the letter was intended to -- to address was specifically at the point of sale, do you violate (d)(3) if you know that the person has a medical marijuana card?

And so what the -- again, what the ATF said, and which was completely reasonable and well within the scope of their interpretation of the statute and the regulation, is that this is clearly an inference that you can make. If they've averred to the State of Nevada that they are going to use marijuana and they have a card that allows them to use marijuana, that's

information that you could use in your determination of whether or not this person is an unlawful user of a controlled substance.

And so that -- again, that's what that -- the focus of the letter is, and that's what -- that's why the letter was sent, and that's why it addresses the issues of the sellers.

THE COURT: All right. Well, I appreciate both counsel's comments. I'm now inclined to look at this more as a prior restraint issue that hasn't actually been claimed yet. So I'm going to take it under advisement, I'm not going to rule now. I'm thinking perhaps this is a -- the situation where the Government's Motion to Dismiss might be granted with leave to amend, and perhaps it needs to be either pled completely different or not. But it does sound like we might be a little bit short of an actual -- of the issue that the Plaintiff intended to allege at this point because of the fact that there's -- the four corners of the Complaint is all that I'm looking at, and that's what I'm going base my determination on.

And just to -- I suppose just to get on the pulpit for a second and to say, again -- which I -- I find myself saying very often lately -- is that the Court's purpose is not to render rulings based on passions or emotions or what I would do if I were a legislator, because I'm not. We do have a legislative body, we do have administrative bodies. They are delegated from time to time with the authority to prescribe

rules and regulations so that they can effect the purpose of the laws that are enacted by Congress and signed into law by the President.

And so it's not for this Court to say at this point whether or not the -- the theories of the Plaintiff I think is asking the Court to rule on are correct or not because I don't -- I'm not sure that they're properly before the Court at this point, and it's a question of whether or not they're constitutional, not whether or not I like it or don't like it.

So I think with that being said, it's -- it's probably premature, the Complaint, but I will look into it. I look forward to the briefing as to the standing issue still, and also as to whether or not there's a notice and comment that needs to be provided as to this particular interpretation given in the Open Letter or not, whether it's interpretative or whether it's not.

Mike, do we have a briefing schedule? Do we want to just have a -- since we have dual Motions to Dismiss, I think we can just do the one deadline for both to submit blind briefs on the standing and issue, as well as the Nordyke issue. And then -- I don't know. What do you all think you need? Two weeks or more? Three weeks? I don't want to cut you short.

MR. RAINEY: Yeah. You know, Your Honor, I -- I have a prescheduled trip to Croatia to work from our Croatian office for the next few weeks. I'm not going to be back until

December 6th. And I don't think there's a rush on this. I'd prefer it if we could have something maybe --

THE COURT: I'm sure the Government doesn't have a rush on this because, the way it stands now, Miss Wilson cannot obtain a firearm. So if anyone has a rush --

MR. RAINEY: Yeah.

THE COURT: -- my understanding is that Miss Wilson would be the one who has --

MR. RAINEY: Yeah.

THE COURT: -- the most to lose from any delay. So it's up to you all. I know you want to take your best opportunity to explain everything to me that I need to know rather than rush through it.

MR. RAINEY: Right. I would prefer it be sometime like mid December, like December 15th, or even December -- you know, before Christmas, but mid December would be nice.

THE COURT: All right. So Mike, something right before Christmas. So -- Mr. Theis, I'm just assuming, but I should ask you, if that's all right with you, something mid December before Christmas?

DEPUTY CLERK: 45 days, Your Honor, would be December 17th, 2012.

THE COURT: All right. So December 17th at, we'll say, 4:00 p.m. so that we can get it -- so 4:00 p.m. on December 17th. What day of the week is that?

DEPUTY CLERK: That is a Monday, Your Honor.

THE COURT: On a Monday. So you even have an extra weekend there to work on it. So Monday, 4:00 p.m. Go ahead and --

I'm hoping that you'll just stick to -- you know, the issues that I really need to know is the Nordyke, and the standing issue, and whether or not it's an interpretative rule or not that requires -- whether it requires comment and notice or not.

MR. THEIS: If I might briefly, Your Honor. So I understand the second point, the notice and comment.

The first comment as I understood was -- and correct me if I'm wrong -- is that -- is whether there's standing to bring (d)(3) because she is not a seller. Is that what we're -- the focus of the standing question is? Or -- I'm sorry. Or in your order were you --

THE COURT: That was the only one originally that I thought was an issue. Now I'm not so sure whether the -- there's -- there's a standing question because she didn't complete the application. But the representation is that she was also prevented from completing the application. So maybe there's not a standing issue as to that regard, but there does seem to be as to the seller's statute, that section.

MR. THEIS: And the -- the Nordyke question? So is that a separate --

THE COURT: So the Nordyke question is, is it a rational basis? Because that's what the En Banc Court decided, and all the other cases seem to indicate that intermediate scrutiny is correct, but we still have the Plaintiff asking for the strict scrutiny.

So how do I reconcile all that, keeping in mind that the other cases are not Ninth Circuit cases, and the Nordyke case is a Ninth Circuit case, which has direct precedential value on this Court.

MR. THEIS: So those are the three issues that we then -- as we understand -- okay.

THE COURT: Yeah. And if you think of something else, file leave to amend -- I mean -- leave to supplement, rather, if there's something else that you think I need to know that we -- that aren't -- isn't contained in those three.

But I'd prefer if you can -- if you stick to those three, keeping in mind, if you didn't put it in the Complaint, it's probably not something that needs to be argued now. And if there is no Statute of Limitations issue, then you probably can raise it later, or she could always apply again and see what happens there. That would be, I believe, a whole new cause of action and then --

MR. RAINEY: Your Honor, if I may. Given the discussion today, would it be appropriate for me to file a Motion to Amend at this time?

THE COURT: Say that again?

MR. RAINEY: Would it appropriate for me to file a Motion to Request Leave to Amend the Complaint at this time?

THE COURT: Well, I was thinking about that, but you hadn't made that motion.

MR. RAINEY: I'd be happy to make that motion.

THE COURT: You could make that motion. I don't know if I'll address it before or after the Motion to Dismiss.

MR. RAINEY: Right.

THE COURT: I usually do address both at the same time --

MR. RAINEY: Okay.

THE COURT: -- but --

MR. RAINEY: I will try to get you that motion right away, and I'll also talked to my opposing counsel here and see if there's any sort of stipulation --

THE COURT: A stipulation is always --

MR. RAINEY: -- or agreement that we can --

THE COURT: -- something that's easier for me to sign within a day or two, obviously, yes.

MR. RAINEY: Okay. And I guess if that happened, then we would have to restart -- jump start everything over again.

THE COURT: Okay. If you want to address whether the issue that she raises is even ripe or not, you can go ahead and --

MR. RAINEY: Ripeness.

THE COURT: -- and address that, I suppose, since the issue of her application is a ripeness question, but probably can be addressed along with standing.

My understanding is that what she's asserting is that she would have completed the application had she been allowed to, but that the seller did not allow her to, and that there is a declaration from the seller that justifies her position.

I can't tell you honestly right now, I can't remember off the top of my head if it actually says that or not. But --

So if you go back and look at it and that's not what it says and you want to argue ripeness, obviously, that's something that the Court would be interested in. But I -- I'm taking the Plaintiff at this point at his word as an Officer of the Court that that's, in fact, what the declaration says. If you find otherwise, you probably want to address that.

Anything else that you think that we should be thinking about addressing in these supplemental briefs or -- it always helps to have these hearings to help us all focus on what the actual issues are here.

So I'll just leave it at that, that those are the issues to be addressed. If you do find other issues that you want to address, please file leave to supplement and address separately, as a separate motion, and then address anything else that's not included in those limitations. All right.

MR. THEIS: And that could be before we submit the -- move to file leave to supplement?

THE COURT: You can just do it together.

MR. THEIS: Right, okay.

THE COURT: If I grant it then I consider it, so you would actually brief it, as well. Kind of like when you do a Motion to Amend the Complaint and you have to attach the Complaint as amended, as well, you know, do that. That way I'll have it all together.

MR. THEIS: All right.

THE COURT: Okay? Any questions? All right. So that's the date. I didn't write it down. Mike, I'm sorry, could you repeat it?

DEPUTY CLERK: It's December 17th, 2012 at 4:00 p.m.

THE COURT: Okay. So Monday, December 17th at 4:00 p.m., 2012, obviously.

If anyone has a need to extend that deadline for whatever reason, and you can agree to a different deadline and file a stipulation, I'll sign that. It's --

You know, like I said, from my point of view, it's the Plaintiff's concern to get this done quicker rather than later. So if you all have a stipulation, I'll go ahead and sign that.

All right? Thank you very much counsel for coming in today. Court's in recess.

(Proceedings concluded at 10:43:20 a.m.)

C E R T I F I C A T E

I, Ellen L. Ford, court-approved transcriber, certify that the foregoing is a correct transcript transcribed from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ ELLEN L. FORD
Ellen L. Ford

January 11, 2013
Date